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FEDERAL COMMUNICATIONS COMMISSION

James H. Quello, Chairman

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-261

In re Application of

Quality Communications
Corporation

For Renewal of License of BR-890606UF
Station WYNO(AM)
Nelsonville, Ohio

HEARING DESIGNATION ORDER

Adopted: October 5, 1993; Released: October 18, 1993

By the Chief, Audio Services Division:

1. The Chief, Audio Services Division, Mass Media Bureau, has before him: (a) the captioned application for renewal of license filed by Quality Communications Corporation ("Quality"), licensee of WYNO(AM), Nelsonville, Ohio, and, (b) the results of an investigation into WYNO(AM)'s silent status.[1]

2. The Commission's records indicate that WYNO(AM) has been silent since June 30, 1990. The station's authority to remain silent expired on July 31, 1991. No further requests for authority to remain silent have been received. The current renewal of license application for WYNO(AM) has not been acted upon because of the station's silent status and because Quality has failed to respond to a letter, dated September 3, 1991, from the Assistant Chief, Audio Services Division, Mass Media Bureau, requesting information regarding the environmental impact of WYNO's RF radiation.[2]

3. The Chief, AM Branch, Audio Services Division, Mass Media Bureau, by letters dated April 8, 1992, and January 29, 1993, requested that Quality provide further information regarding the station's operational status, including information concerning its compliance with Section 73.1740 (Minimum Operating Schedule) of the Commission's Rules.[3] No response to these letters has been received. Consequently, WYNO(AM) is currently off the air without authority. This fact, coupled with the fact that WYNO(AM) has been off the air for over three years, supports our determination that Quality is in apparent violation of Sections 73.1740(a)(4) and 73.1750 (Discontinuance of Operation) of the Commission's Rules.[4] The evidence before us is sufficient to raise a substantial and material question of fact regarding Quality's capability and intent to resume the broadcast operations of WYNO(AM). We will therefore designate the WYNO(AM) renewal of license application for an evidentiary hearing on appropriate issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 309(e), the renewal of license application of Station WYNO(AM), Nelsonville, Ohio, IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine whether Quality Communications Corporation has the capability and intent to expeditiously resume broadcast operations of WYNO(AM) consistent with the Commission's Rules;

(b) To determine whether Quality has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules;

(c) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

5. IT IS FURTHER ORDERED, That, in the event it is determined that grant of the renewal of license application would serve the public interest, convenience and necessity, the grant will be conditioned on: (i) the expeditious resumption of operation, the precise period of time to be established in the hearing; and (ii) prior to the actual resumption of broadcasting, the licensee must establish that

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[1] The Mass Media Bureau has been delegated authority to designate for hearing the renewal of license applications of silent broadcast stations. *See Moenkopi Communications, Inc.*, 8 FCC Rcd 3990 (1993).

[2] It is the Commission's general policy to defer action on a station's renewal of license application while that station is silent.

[3] Section 73.1740(a)(4) provides:

"In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

Section 73.1750 reads:

"The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

there will not be a significant environmental impact from RF radiation and that the station complies with the "Radio Frequency Guide" adopted by the American National Standards Institute (ANSI C95.1-1982). Failure to resume operations within the time specified in the condition will result in the cancellation of the license and the deletion of the station's call letters.

6. IT IS FURTHER ORDERED, That, in accordance with Section 309(e) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the LICENSEE, Quality Communications Corporation.

7. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.221(c) of the Commission's Rules, SHALL FILE with the Commission, in person or by attorney, within twenty (20) days of the mailing of this Order, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the licensee herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rules, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

9. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order denying the renewal of license application of WYNO(AM), Nelsonville, Ohio, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-262

In the Matter of

Delta Radio, Inc.

Licensee of Station WDTL(AM)
Cleveland, Mississippi

Order to Show Cause Why the
License for Station WDTL(AM)
Cleveland, Mississippi Should
Not be Revoked

ORDER TO SHOW CAUSE AND HEARING DESIGNATION ORDER

Adopted: October 5, 1993; Released: October 18, 1993

By the Chief, Audio Services Division:

1. The Chief, Audio Service Division, Mass Media Bureau, has before him for consideration: (a) the license held by Delta Radio, Inc. ("Delta") for Station WDTL(AM), Cleveland, Mississippi; and (b) the results of an investigation into WDTL(AM)'s silent status.[1]

2. The Commission's records indicate that WDTL(AM) has been off the air since June 4, 1990.[2] The licensee's last request for authority to remain silent was granted through April 29, 1993 by letter, dated January 29, 1993, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau. In that letter, Delta was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of steps being taken to return WDTL(AM) to on-air operations. By letter dated April 27, 1993, Delta responded that because of WDTL(AM)'s transmitter problems and WDTL-FM's personnel problems, it was unable to return WDTL(AM) to the air.[3] This letter failed to include a timetable detailing steps being taken by Delta to return WDTL(AM) to on-air operations and it appears that no substantial progress has been made by Delta to return WDTL(AM) to the air. Because Delta has not demonstrated that causes beyond its control prevent it from resuming broadcast operations, Delta is in apparent violation of Sections 73.1740(a)(4) of the Commission's Rules.[4] Because of the protracted period of time in which the station has been silent, and because Delta apparently lacks the ability and/or intent to restore WDTL(AM) to broadcast status, Delta is also in apparent violation of 73.1750 of the Commission's Rules.[5]

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, Delta Radio, Inc. is DIRECTED TO SHOW CAUSE why the license for Station WDTL(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Delta Radio, Inc. has the capability and intent to expeditiously resume broadcast operations of WDTL(AM) consistent with the Commission's Rules.

(b) To determine whether Delta Radio, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Delta Radio, Inc. is qualified to be and remain the licensee of Station WDTL(AM).

4. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the

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[1] The Mass Media Bureau has been delegated authority to issue and release Show Cause Orders in cases involving silent broadcast stations. *See Debrine Communications, Inc.*, 7 FCC Rcd 2118 (1992).

[2] Delta is also the licensee of WDTL-FM, Cleveland, Mississippi, which had been silent but which returned to the air on March 16, 1992.

[3] Delta also states that WDTL(AM) requires a new transmitter and Delta does not want to purchase one until it determines if it will be allotted a frequency on the new AM "expanded band." Delta, however, has failed to file a petition to migrate to the "expanded band" and the filing window for such petitions closed on June 30, 1993.

[4] Section 73.1740(a)(4) provides:

> "In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

[5] Section 73.1750 provides:

> "The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

5. IT IS FURTHER ORDERED, That to avail himself of the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that he will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving his right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered.[6]

6. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WDTL(AM), Cleveland, Mississippi, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

[6] The Mass Media Bureau has been delegated authority to issue Revocation Orders in cases involving silent broadcast stations. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-264

In re Applications of

FRANK B. DUROSS (hereafter "DuRoss") — File No. BPH-920512MC

NEW HORIZONS BROADCASTING PARTNERSHIP (hereafter "New Horizons") — File No. BPH-920513MF

KENNETH F. ROSER, JR. (hereafter "Roser") — File No. BPH-920513MI

KEVIN O'KANE (hereafter "O'Kane") — File No. BPH-920514MK

For Construction Permit
for a New FM Station on Channel 250A
in Whitesboro, New York

HEARING DESIGNATION ORDER

Adopted: September 1, 1993; Released: October 18, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *New Horizons.* New Horizons proposes to side-mount its antenna on the existing tower WKGW, Utica, NY. This tower is listed in the Commission's official record as being located at coordinates 43^0 03' *27*"NL, 75^0 25' *04*"WL, the same coordinates listed in Item 2, Section V-B of New Horizons' Form 301 application. However, the coordinates plotted on the transmitter site map (printed on the map as "Radio Station WRUN") are 43^0 03' *23*" NL, 75^0 25' *02*"WL. Because New Horizons proposes to locate its antenna on an existing tower contained in the Commission's official records, this discrepancy is neither a tender nor an acceptance defect and may be rectified by amendment. Accordingly, New Horizons is required to submit a clarifying amendment to the Administrative Law Judge within 30 days of the release of this *Order*.

3. Lori J. Leppert and Michael J. Johnson, general partners of New Horizons, have indicated their intent to terminate their relationship with station WKGW(FM), Utica, New York in the event of grant of the referenced application. Accordingly, in the event of grant of New Horizon's application both partners will be required to sever all connections with WKGW(FM) prior to the commencement of program test authority.

4. On June 26, 1993, Roser petitioned for leave to amend his application. The subject amendment was filed without an original signature by Roser, as required by 47 C.F.R. § 73.3513, but was in fact signed only by Roser's counsel. Accordingly, the amendment will be returned.

5. In Section V-B, Item 7 of the Form 301 and on the tower sketch, O'Kane lists the height above mean sea level for this 159 foot (48 meter) tower as *414* meters. However, the Commission's records for this tower show heights of 159 feet (48 meters) above ground level and *417* meters above mean sea level. Because O'Kane proposes to locate on an existing tower contained in the Commission's official records, the above mean sea level height discrepancy is neither a tender nor an acceptance defect and may be rectified by amendment. Accordingly, O'Kane must submit a clarifying amendment to the Administrative Law Judge within 30 days of the release of this *Order* to resolve this discrepancy.

6. O'Kane has failed to comply with the worker-safety provision of OST Bulletin No. 65, October 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," as it failed to indicate how workers engaged in maintenance and repair on its tower would be protected from exposure to radiofrequency ("RF") radiation levels exceeding the ANSI guidelines. *Id.*, at 28. Grant of his application will therefore contain the following condition:

> The permittee/licensee must reduce power or cease operation as necessary to protect persons having access to the site, tower, or antenna from radiofrequency radiation in excess of FCC guidelines.[2]

7. O'Kane is 37.5% owner, President and General Manager of Mohawk Valley Broadcasting Inc., licensee of station WFXV(TV), Utica, New York. O'Kane has indicated his intent to terminate his relationship with station WFXV(TV) in the event of grant of his application. Accordingly, in the event of grant of O'Kane's application, he will be required to sever all connections with station WFXV(TV) prior to the commencement of program test authority.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent order, upon the following issues:

[1] On February 19, 1993, the application of William H. Walker, III (File No. BPH-920513ME) was dismissed for failure to pay the hearing fee, pursuant to 47 C.F.R. § 73.3573(g)(2) of the Commission's Rules.

[2] While the other applicants here have adequately addressed the worker-safety issue, grant of any of their applications will contain a similar condition.

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That in the event of grant of New Horizon's application, Lori J. Leppert and Michael J. Johnson shall divest themselves of any interest in and sever all connections with station WKGW(FM), Utica, New York, prior to the commencement of program test authority.

11. IT IS FURTHER ORDERED, That the June 26, 1993 amendment filed by Roser IS HEREBY RETURNED.

12. IT IS FURTHER ORDERED, That New Horizons and O'Kane are required to submit amendments correcting the discrepancies respectively detailed in paragraphs 2 and 5 above to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That in accordance with paragraph 6 above, any construction permit issued in this proceeding shall contain the appropriate condition regarding protection of workers and others with authorized access to the site, tower, or antenna.

14. IT IS FURTHER ORDERED, That, in the event of grant of O'Kane 's application, he shall divest himself of all interest in and sever all connections with station WFXV(TV), Utica, New York, prior to the commencement of program test authority.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.1221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in (a) the Standard Document Production Order (*See* Section 1.325(c)(1) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *on reconsideration.*, FCC 91-154, paras. 7-8 & n.3, Appendix paras. 3 & 5, released May 15, 1991.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-263

In re Applications of

DESOTO BROADCASTING CORP. (hereafter "DBC") File No. BPH-920324ME

CARY D. CAMP (hereafter "Camp") File No. BPH-920402MI

MITCHELL TYNER (hereafter "Tyner") File No. BPH-920403MA

For Construction Permit for a
New FM Station on Channel 284C3
in Mansfield, Louisiana

HEARING DESIGNATION ORDER

Adopted: October 5, 1993; Released: October 18, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *DBC.* Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Also, Section III, Item 3 of the form requires that an applicant specify each source of funds, including the name, address, telephone number, contact person if the source is an entity, any relationship of the source to the applicant, and the amount of funds to be supplied by each source. DBC has not completed these items correctly. DBC's application gives a post office box number as the residence address for Robert L. Clifford, who is listed as both a 75 percent stockholder of DBC, as well as its president, and as its sole source of funds. Accordingly, DBC must file an amendment which gives all the information required by Section II, Item 6 and Section III, Item 3 with the presiding Administrative Law Judge after this Order is released.

3. *Camp.* Section II, Items 1-5 (page 2) of Form 301 (June 1989) was not included in Camp's application. These omissions are not tenderability or acceptability defects. Accordingly, Camp must file an amendment which provides Section II, Items 1-5 (page 2) with the presiding Administrative Law Judge after this Order is released.

4. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and population which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That DBC shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. IT IS FURTHER ORDERED, That DBC shall submit an amendment which contains the information required by Section III, Item 3 of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That Camp shall submit an amendment which contains Section II, Items 1-5 (page 2) of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standard-

ized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sonix IV NAL/Acct. No. 215HF0011
7320 La Cienega Boulevard
Inglewood, California 90302

NOTICE OF FORFEITURE

Adopted: October 4, 1993; Released: October 18, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Forfeiture (NOF) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b) (the Act), to Sonix IV, (Sonix) for willful violation of Section 302(b), of the Communications Act, 47 U.S.C. § 302(b), and Sections 18.307(a), and 2.931 of the Commission's Rules, 47 C.F.R. §§ 18.307(a) and 2.931, by marketing an ultrasonic cleaner which does not conform to the Commission's equipment authorization rules and could not be certified.

2. The appropriate amount of forfeiture for this violation is $10,000.

II. BACKGROUND AND DISCUSSION

3. On July 8, 1992, the Field Operations Bureau, Enforcement Division issued a Notice of Apparent Liability (NAL) to Sonix IV, in the amount of $10,000. Sonix IV was afforded 30 days to respond to the NAL with circumstances mitigating or cancelling the forfeiture. To date, Sonix IV has not responded to the Commission.

III. ORDERING CLAUSES

4. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503, and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Sonix IV, SHALL FORFEIT A MONETARY FORFEITURE in the amount of $10,000 for violating Section 302(b) of the Communications Act, 47 U.S.C. § 302(b), and Sections 18.307(a), and 2.931 of the Commission's Rules, 47 C.F.R. §§18.307(a) & 2.931.

5. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that Sonix IV, shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture. Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL Acct. No. 215HF0011, and mailed to the following address:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Legal Branch/Stop Code 1500E/LF
1919 M Street, N.W.
Washington, DC 20554

6. IT IS FURTHERED ORDERED that this Forfeiture Order shall be sent by certified mail, return receipt requested, to Sonix IV, 7320 La Cienega Boulevard, Inglewood, California 90302.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Stoner Broadcasting System, Inc. File No. BRH-910130UC

For Renewal of License of
Station WYRK(FM)
Buffalo, New York

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: October 8, 1993; Released: October 18, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) the license renewal application for Station WYRK(FM) in Buffalo, New York; (ii) a Petition to Deny timely filed by the New York State Conference of Branches of the National Association for the Advancement of Colored People (NAACP) and various local NAACP branches in New York against the above-captioned renewal application;[1] (iii) an opposition from the licensee; and (iv) the licensee's response to a staff letter of inquiry. The NAACP alleges that the above station violated the Commission's equal employment opportunity (EEO) Rule and policies toward minorities. The petitioner requests that the Commission designate the licensee's renewal application for hearing and deny the application.

II. BACKGROUND

2. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition to deny was a declaration under penalty of perjury from the president of the NAACP branch in the area of the petitioned station. The branch president claimed to be a regular listener to the station. We find that the declaration meets the requirements for establishing standing for the NAACP. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987) (*American Legal*). Therefore, the challenge filed by the NAACP constitutes a valid petition to deny against WYRK(FM).

III. PLEADINGS

4. The NAACP derived its factual allegations from the licensee's EEO program and annual employment reports. Review of the allegations led us to conclude that they presented a prima facie case demonstrating that unconditional grant of the renewal application would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1).[2] *Astroline, supra*. Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*). However, review of the entire record, including the licensee's response to further inquiry, indicates that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that the licensee engaged in discrimination. Thus, grant of the renewal application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra*. Accordingly, the challenge against WYRK(FM)'s renewal application filed by the NAACP is denied and the renewal application will be granted, as noted, *infra*.

IV. DISCUSSION

5. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b) and (c).

6. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if

[1] The NAACP challenged the renewal applications of 16 radio stations in New York. The current *Order* addresses the application of WYRK(FM). We will address the applications of the remaining stations separately.

[2] The licensee was not challenged regarding its recruitment of women. Nonetheless, as is our practice in all cases, we reviewed the licensee's EEO efforts in this respect and found them to be sufficient.

the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (hereinafter *Broadcast EEO), petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters) (hereinafter *Clarification of Broadcast EEO). See e.g., Beaumont, supra; Bilingual, supra.*

7. A review of the licensee's 1991 EEO Program Report, opposition to the petition to deny and response to our inquiry reveals that the licensee had 24 overall, including 20 upper-level, full-time hiring opportunities from March 3, 1988, through May 7, 1991.[3] The licensee recruited for 20 of its vacancies and used general recruitment sources as follows: New York Department of Labor (contacted for 11 vacancies), State University of New York at Buffalo (11 vacancies), State University College at Buffalo (11 vacancies), St. Ann's Neighborhood Center (10 vacancies), and Broadway Fillmore Area Council (10 vacancies). It used the following sources for five or fewer vacancies: four newspapers and magazines, three employment agencies, three colleges, Job Corps, a women's club, and ads on the air. Its records on minority referrals are incomplete but WYRK(FM) reported six minority referrals -- one from each of the following: Robert Half Agency, *Buffalo News*, D'Youville College, Job Corps, employee referrals, and walk-ins. The licensee contacted four minority recruitment sources, from which it received no minority referrals, as follows: NAACP (contacted for 11 vacancies), Buffalo Area Black Media Coalition (10 vacancies), Puerto Rican American Community Association (five vacancies), and the Urban League (one vacancy). The licensee also reported, in addition to public recruitment, that it specifically recruited and hired Blacks for station manager and news director positions.

8. The licensee stated that because of incomplete records and difficulty in ascertaining the race of applicants who mailed in applications, its information on the race of applicants is incomplete. The licensee stated, however, that it is certain it received applications from at least eight Blacks and one Asian and that it interviewed all of them. Minorities were considered for 15 positions, 12 of which were upper-level.[4] Of the 24 hires, five were minority (Black). Of 20 upper-level hires, two were minority -- the station manager and news director mentioned earlier.[5] In addition, the licensee reported that it offered a full-time upper-level sales position to a Black saleswoman at another station in January 1989, but she declined the offer.

9. The NAACP argues that the licensee received few minority referrals and none from minority recruitment sources. It criticizes the licensee's EEO program because it cannot tell if minority sources were contacted for every opening. The petitioner argues that the licensee failed to self-assess its EEO program or propose remedial action to improve deficiencies. It further states that the licensee's hiring of minorities was "token."

10. The licensee responded that its general sources have been more productive than its minority sources in providing minority referrals but that it has received more minority referrals than its records indicate. It acknowledged that its record-keeping has not always been "comprehensive" but stated that it increased and improved its records. It also noted that it has recruited publicly for 20 of 24 openings and recruited and hired specific minorities for two of the four openings for which it did no other recruitment. It stated that it has frequently assessed its program and noted that it added sources five times from January to August 1989, once in January 1990, and once in May 1991. It disputed the NAACP's argument that its minority employment was token, noting that it employed minorities in six years of its seven-year term and hired Blacks as station manager and news director among its five minority hires for full-time positions.

11. After reviewing the record of Station WYRK(FM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra.* The licensee engaged in recruitment and hired and employed minorities and women. We find no evidence indicating that the licensee engaged in discrimination. We also find that the record of the licensee warrants unconditional renewal. However, the licensee should ensure that its recruitment records are complete and sufficient enough to allow meaningful self-assessment.

V. CONCLUSION

12. After considering the information before us, we find that a hearing is not warranted and the record of the licensee of WYRK(FM) supports grant of its renewal application without condition.

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[3] The license term for WYRK(FM) ended on May 31, 1991.

[4] We note that these numbers include minorities who were considered for more than one position.

[5] The labor force of the Buffalo, New York MSA is 42.1% female and 9.9% minority (7.9% Black, 1.1% Hispanic, 0.5% Asian/Pacific Islander, and 0.4% American Indian). The licensee's Annual Employment Report for 1985 indicates that the licensee employed 16 persons overall (14 upper-level) with one (6.3%) minority (Black) in a lower-level position. All minorities employed by the licensee during the license term were Black. In 1986, the licensee employed 19 persons overall (17 upper-level) with one (5.3%) Black in a lower-level position. In 1987, the licensee employed 18 persons overall (16 upper-level) with one (5.6%) Black in a lower-level position. In 1988, the license employed 18 persons overall (16 upper-level) with no minorities. In 1989, the licensee employed 21 persons overall (19 upper-level), with one (4.8%) Black in a lower-level position. In 1990, the licensee employed 20 persons (18 upper-level) with two (10.0%) Blacks, one (5.6%) in an upper-level position. In 1991, the licensee employed 19 persons overall (17 upper-level) with two (10.0%) Blacks, one (5.9%) in an upper-level position.

VI. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the petition to deny filed by the NAACP against the licensee of WYRK(FM) IS DENIED.

14. IT IS FURTHER ORDERED that the license renewal application filed by Stoner Broadcasting System, Inc. for Station WYRK(FM) IS GRANTED.[6]

15. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

16. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] In taking this action, we are mindful that on September 13, 1993, the Commission granted the assignment application filed by the licensee (File No. BALH-930702HO) assigning the license of WYRK(FM) to American Radio Systems License Corporation, with the condition that the assignment could only be consummated after grant of this license renewal. This *Order* now grants the renewal and the assignment may be consummated.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of NAL/ACCT. NO. #215LA0026

Parity Systems, Inc.
Campbell, California

Liability for Monetary
Forfeiture

ORDER

Adopted: October 5, 1993; Released: October 18, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Parity Systems, Inc. (Parity) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's July 27, 1992 action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. As explained below, we are affirming the monetary forfeiture penalty.

2. The appropriate amount of the forfeiture is $7.000.

II. BACKGROUND

3. Our records show that on October 23, 1991, Parity was exhibiting a laptop portable computer (Model Sparc 6122-II) at the Fall '91 COMDEX computer trade show in Las Vegas, Nevada. The Sparc 6122-II had not been certified by the Commission as required. The computer was labeled as complying with the Rules regarding a Class A digital device.

4. On July 27, 1992, the FCC's Los Angeles Field Office (LA) issued Parity Systems, Inc., a Notice of Apparent Liability which proposed a monetary forfeiture in the amount of $7,000 for violating Section 302(b) of the Communications Act and Section 2.803 of the FCC's Rules by marketing computers that had not been authorized by the FCC. 47 U.S.C. § 302(b), 47 C.F.R. § 2.803.

5. Parity responded by letter dated August 4, 1992. Parity stated that the computer was intended for industrial use, was sold only for industrial or business use, was priced for sale at $10-15 thousand dollars and should, therefore, be considered a Class A digital device. Based on Parity's response, the LA Field Office issued a Notice of Forfeiture on August 28, 1992. Parity now appeals that decision.

6. Parity requests cancellation of the forfeiture arguing that the computer it exhibited was not a portable laptop computer. Parity contends that its own characterization of the computer as a laptop was in error because the computer is an industrial computer, with an industrial motherboard, and has only been sold to industrial clients for use in industry. Parity also argues that any violation resulted from a misunderstanding of the requirements of certification and was, therefore, not willful.

III. DISCUSSION

7. The Sparc 6122-II's portable nature and its ability to run many common types of software are conducive to its use in many settings, including a residential environment. Such use requires that the computer be considered a Class B digital device and subjects it to the certification requirements. *See* 47 C.F.R. § 15.3(h), (i), (s). Although Parity contends that all sales of the equipment were made to industry or business entities, the very application of a laptop presupposes its use in other settings, including residential ones.[1]

IV. CONCLUSION

8. Parity has violated Section 302(b) of the Act and Section 2.803 of the Commission's Rules, by marketing uncertified Class B digital devices.

9. For the reasons stated above, we affirm the finding of liability for monetary forfeiture in the amount of $7,000. Petitioner has failed to set forth any reasons justifying a reduction of the forfeiture amount. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments was considered, see *1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382 (released: August 12, 1993). No further adjustments appear warranted.

V. ORDERING CLAUSES

10. IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.80 of the FCC's Rules, that the relief sought in the Petition for Reconsideration filed by Parity Systems, Inc. is DENIED. 47 C.F.R. § 1.106.

11. IT IS FURTHER ORDERED that Parity Systems, Inc. shall submit the $7,000 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place NAL number (215LA0026) on the remittance and send it to:

[1] It is the portable nature of the device that defines it as a Class B personal computer, rather than its actual application. We note petitoner's argument that its laptop is better termed "lugable" than portable because it weighs close to twenty pounds. This assertion, however, is contradicted by Petitoner's own advertisement of the device, which touts the laptop's "compact packaging" weighing "less than 13.5 pounds with batteries installed."

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

12. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Parity Systems, Inc., 110 Knowles Drive, Los Gatos, California 95030.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 19, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITION FOR CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION OF THE SPECS CEI WAIVER ORDER

On September 27, 1993, AT&T filed a petition for clarification or, in the alternative, reconsideration of the Commission's Memorandum Opinion and Order, (DA 93-1042, released August 27, 1993, hereinafter, *SPECS Waiver Order),* which grants AT&T a limited waiver of the *Computer III* comparably efficient interconnection (CEI) requirements so that it may offer enhanced services through its Stand-Alone Public Enhanced Communications System (SPECS).

AT&T requests that the Commission make explicit that the *SPECS Waiver Order* authorizes AT&T to enable its SPECS public telephone to operate as a "dumb terminal." AT&T states that this "dumb" terminal functionality would provide non-discriminatory access to other enhanced service provider offerings that utilize accepted ASCII character code and VT-100 terminal standards. Alternatively, AT&T requests that the Commission authorize the "dumb terminal" capability for the same reasons that the FCC granted AT&T authority to provide specific enhanced services pursuant to the *SPECS Waiver Order.*

Interested parties are to file comments on this petition by **November 5, 1993**, and reply comments by **November 22, 1993**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§1.1200-1.1216. For further information contact Daniel Gonzalez, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1299.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 19, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NEVADA BELL'S PETITION FOR WAIVER OF THE COMMISSION'S 1995 800 DATA BASE TIME STANDARD

CC Docket No. 86-10

On September 20, 1993, Nevada Bell filed a Petition For Waiver of the 1995 access time standard for 800 Data Base Service, established in the *Memorandum Opinion and Order* on Reconsideration in this docket, 6 FCC Rcd 5421 (1991). That standard requires Nevada Bell to be capable of achieving access times of five seconds or less for all of its 800 data base traffic by March 4, 1995. Nevada Bell seeks a waiver of the requirement for one switch -- its central office switch in Mina, Nevada.

Nevada Bell maintains that the Mina switch serves only 196 access lines and that meeting the 1995 access time standard would require replacing this switch at a cost of more than $1 million. It maintains, further, that the access time for traffic routed from this switch is 6.2 seconds, only 1.2 seconds above the standard. It asserts that the Mina switch will become obsolete and need to be replaced in five to seven years. It asks that it not be forced to replace the switch sooner.

Interested parties are to file comments on this petition for waiver by **November 4, 1993**, and reply comments by **November 19, 1993**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Gary Phillips, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4048.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-93-267

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in a Digital Submarine Cable System Between Argentina, Brazil and Uruguay (the Unisur Cable System)

ORDER AND AUTHORIZATION

Adopted: October 7, 1993; Released: October 19, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T)[1] pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-267 IS GRANTED and AT&T is authorized to:

a. acquire and operate 43 half-interests in its assigned Minimum Investment Units (MIUs)[2] of capacity in Segment A, 38 half-interests in its assigned MIUs of capacity in Segment B, and 5 half-interests in its assigned MIUs of capacity in Segment C of the UNISUR cable system[3];

b. lease appropriate extension facilities; and

c. activate the aforementioned capacity and extension facilities for the provision of its authorized telecommunications services to its certificated points served by the UNISUR cable system.

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] AT&T's wholly-owned subsidiary, Transoceanic Communications, Inc., will own portions of the UNISUR Cable System on behalf of AT&T.

[2] A MIU, as defined in the UNISUR Construction and Maintenance Agreement (C&MA), is a unit in a Segment of the UNISUR Cable System which allows the effective use of 2.048 Mbps and the additional 0.128 Mbps required for multiplexing in each direction. The estimated original capital cost for the UNISUR Cable System is $74.4 million and AT&T's initial share of the capital cost for its assigned MIUs, is approximately $7.8 million, plus approximately $1 million in interest during construction.

[3] The UNISUR cable system, co-owned by twenty-two parties including AT&T and three other U.S. carriers, extends between Las Toninas, Argentina, Florianopolis, Brazil and Maldonado, Uruguay. As a party to the C&MA, AT&T's current percentage ownership interest in the UNISUR cable system is 10.4787%. The estimated half-MIU cost is $72,300, plus $1 million in interest during construction, and the unit costs are expected to decrease as additional carriers acquire capacity (*see* Letter from Bob Mercer, AT&T to Jennifer Warren, International Facilities Division, Common Carrier Bureau, dated October 4, 1993). The UNISUR cable system has a Design Capacity of 512 MIUs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-93-268

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in a Digital Submarine Cable System Between Spain, the United Kingdom, Belgium and the Netherlands

ORDER AND AUTHORIZATION

Adopted: October 7, 1993; Released: October 19, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T)[1] pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-268 IS GRANTED and AT&T is authorized to:

a. acquire and operate 24 half-interests in its assigned Minimum Investment Units (MIUs)[2] of capacity in Segment 1, 233 half-interests in its assigned MIUs of capacity in Segment 2, and 209 half-interests in its assigned MIUs of capacity in Segment 3 of the Rioja cable system[3];

b. lease appropriate extension facilities; and

c. activate the aforementioned capacity and extension facilities for the provision of its authorized telecommunications services to its certificated points served by the Rioja cable system.

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] AT&T's wholly-owned subsidiary, Transoceanic Communications, Inc., will own portions of the Rioja Cable System on behalf of AT&T.

[2] A MIU, as defined in the Rioja Construction and Maintenance Agreement (C&MA), is a unit of ownership which means a 2.048 Mbit/s digital bit stream consistening of two-half interests which are assigned to two correspondents repectively for joint working, or both assigned to one party. The estimated original capital cost of the Rioja cable system is $141.7 million and AT&T's initial share of the capital cost for its jointly-assigned MIUs, is approximately $11.6 million, plus approximately $900,000 in interest during construction. *See* Letter from Bob Mercer, AT&T to Jennifer Warren, International Facilities Division, Common Carrier Bureau, dated October 4, 1993.

[3] The Rioja cable system, co-owned by forty-three parties including AT&T and four other U.S. carriers, extends between Santander, Spain; Lands End, United Kingdom; Veurne, Belgium; and Alkmaar, the Netherlands. As a party to the C&MA, AT&T's current percentage ownership interest in the Rioja Cable System is 8.21334%. The Rioja Cable System is divided into three segments. Sub-segment 1B consists of the whole of the submarine cable system between the beach joint in Spain and the beach joint in the United Kingdom, sub-segment 2B consists of the whole of the submarine cable system between the beach joint in the United Kingdom and the beach joint in Belgium, and subsement 3B consists of the whole of the submarine cable system between the beach joint in Belgium and the beach joint in the Netherlands. The estimated half-MIU cost is $45,100 for Segment 1B, $32,300 for Segment 2B, and $14,500 for Segment 3B. The half-MIU cost is expected to decrease as additional carriers acquire capacity. The Rioja cable system has a Design Capacity of 756 MIUs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-93-271

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in a Digital Submarine Cable System (R-J-K Cable System) Between Russia, Japan and Korea

ORDER AND AUTHORIZATION

Adopted: October 7, 1993; Released: October 19, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T)[1] pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-271 IS GRANTED and AT&T is authorized to:

a. acquire and operate half-interests in 4 jointly-assigned Minimum Investment Units (MIUs)[2] of capacity in the R-J-K Cable System[3];

b. lease appropriate extension facilities; and

c. activate the aforementioned capacity and extension facilities for the provision of its authorized telecommunications services to its certificated points served by the R-J-K Cable System.

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] AT&T's wholly-owned subsidiary, Transoceanic Communications, Inc., will own portions of the R-J-K Cable System on behalf of AT&T.

[2] A MIU, as defined in the R-J-K Construction and Maintenance Agreement (C&MA), is a unit designated as the minimum unit of investment in the R-J-K Cable System, allowing the effective use of 2.048 Mbps (Mbit/s) and the additional 162,539.68 bits per second required for multiplexing in each direction.

[3] The R-J-K Cable System, co-owned by eighteen parties including AT&T and 2 other U.S. carriers, extends between landing points at cable stations at Nakhodka, Russia; Naoetsu, Japan; and Pusan, Korea. The estimated original capital cost of the R-J-K Cable System is $93.3 million, and AT&T's initial share of the capital cost for its 4 jointly-assigned MIUs is approximately $1.04 million and approximately $116,000 in interest during construction. As the notional capacity increases, the estimated cost per half-MIU, currently at $260,000, will decrease accordingly. At such time as the cable is fully subscribed, the cost per half-MIU will be approximately $60,900. (*See* Letter from Bob Mercer, AT&T to Jennifer Warren, International Facilities Division, Common Carrier Bureau, dated October 4, 1993.) AT&T's current percentage ownership interest in the R-J-K Cable System is 1.11925%.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-93-272

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in a Digital Submarine Cable System (Malaysia-Thailand Cable System) Between Kuantan, Peninsular Malaysia and Phetchaburi, Thailand

ORDER AND AUTHORIZATION

Adopted: October 7, 1993; Released: October 19, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T)[1] pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-272 IS GRANTED and AT&T is authorized to:

a. acquire and operate half-interests in 90 jointly-assigned Minimum Assignable Unit of Ownership (MAUOs)[2] of capacity in the Malaysia-Thailand Cable System[3];

b. lease appropriate extension facilities; and

c. activate the aforementioned capacity and extension facilities for the provision of its authorized telecommunications services to its certificated points served by the Malaysia-Thailand cable system.

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

---

[1] AT&T's wholly-owned subsidiary, Transoceanic Communications, Inc., will own portions of the Malaysia-Thailand Cable System on behalf of AT&T.

[2] A MAUO is defined in the Construction and Maintenance Agreement (C&MA), as a unit of ownership designated as the minimum, practical unit ownership allowing the use of 73,684.656 bits per second in each direction. A MAOU shall allow the use of 64,000 usable bits per second and the additional 9,684.656 bits per second required for multiplexing the 1890 such MAUOs in a Basic System Module. The estimated original capital cost of the Malaysia-Thailand cable system is $77.3 million, and AT&T's initial share of the capital cost for its 90 jointly-assigned MAUOs is approximately $1,215,000 (90 x $13,500), which includes interest during construction.

[3] The Malaysia-Thailand Cable System, co-owned by thirty-one parties including AT&T and three other U.S. carriers, extends between Cherating, Kuantan and Phetchaburi, Thailand. The cable system consists of two fiber pairs, one which extends between Kuantan, Malaysia and Phetchaburi, Thailand and one which extends between Phetchaburi and Songkhla, Thailand. The latter fiber pair is for domestic use. As a party to the C&MA, AT&T's current percentage ownership interest in the Malaysia-Thailand Cable System is 1.415256%. The estimated half-MAUO cost is $13,500 (the equivalent of a half-MIU cost (30 MAUOs) of $405,000), including interest during construction. As the notional capacity increases, the cost per half-MIU equivalent will decrease accordingly. At a full subscription rate, the cost per half-MIU will be approximately $93,500. (*See* Letter from Bob Mercer, Government Affairs, AT&T to Jennifer Warren, International Facilities Division, Common Carrier Bureau, dated October 4, 1993.) The Design Capacity of the Phetchaburi-Kuantan fiber pair is 7560 MAUOs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jan Mar Courier, Inc. NAL/Acct No. 215LA0068
Los Angeles, California

Liability for Monetary
Forfeiture

ORDER

Adopted: October 14, 1993; Released: October 20, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. Jan Mar Courier, Inc., Los Angeles, California (Jan Mar) submitted a Petition for Reconsideration to the Federal Communications Commission (FCC), dated December 4, 1992, requesting reconsideration of a $7,500 monetary forfeiture penalty assessed by the FCC against Jan Mar. This penalty was imposed for a violation of Section 90.439 of the FCC's rules that requires stations in the Private Land Mobile Radio Services to be made available for inspection by the FCC. 47 C.F.R. Section 90.439.

2. Jan Mar's petition is accepted as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 C.F.R. Section 1.106. As explained below, the imposition of a monetary forfeiture penalty is affirmed, but the penalty is reduced to $6,000.

II. BACKGROUND

3. The FCC's Los Angeles Office received a complaint that Jan Mar was operating a radio transmitter without an FCC license and was causing interference to FCC licensed radio stations. After a search of the FCC's computer files failed to reflect a license for Jan Mar's station, the field office monitored the station and determined that the station was transmitting. An FCC inspector, following standard FCC procedures, then attempted to inspect the station on September 28, 1992, to determine whether it had a license and was operating on authorized frequencies and power.

4. The FCC inspector identified himself to the person operating the transmitter, explained that he had monitored the station's transmissions, and requested a copy of the station license and permission to inspect the transmitter. The operator replied that he had been transmitting, that the owner was not in that day, that the station license was probably in the owner's locked office, and that the station may be inspected. While the FCC inspector was connecting his equipment to the transmitter, but before he could make measurements, Jan Mar's owner telephoned the operator and was told that the FCC was inspecting the station. The owner then asked to speak with the FCC inspector. The FCC inspector identified himself and explained why he was inspecting the station. The owner responded that she did not want the inspection to occur in her absence, and requested that the FCC inspector leave and make an appointment to inspect the station on another day. The FCC inspector explained to the owner and her husband that the FCC does not inspect by appointment, that he was following normal procedures, that the FCC's rules authorized the inspection (he offered to read the rule), that failure to allow the inspection would result in a violation of the FCC's rules, that he would not be removing property from the station, and that the owner could contact his supervisors to verify his identity. The FCC inspector also offered to delay his inspection for a short period that day if the owner wished to come to the station to oversee the inspection. The owner responded that this was impossible because it was Rosh Hashanah, a Jewish holiday for worship, and that the FCC inspector should leave immediately. The FCC inspector complied.

5. On October 5, 1992, the FCC's Los Angeles Office issued a Notice of Apparent Liability for a monetary forfeiture penalty to Jan Mar for a willful violation of Section 90.439 of the FCC's rules for failure to allow an inspection of its radio station. Jan Mar responded on October 23, 1992. The FCC's Los Angeles Office then issued a Forfeiture Order to Jan Mar on November 6, 1992, for a $7,500 monetary forfeiture penalty. The Notice of Apparent Liability and the Forfeiture Order explained in considerable detail the position of the FCC's Los Angeles Office regarding the facts relating to the attempted inspection and the FCC rule that it cited as violated. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b).

III. DISCUSSION

6. Jan Mar's main argument against the monetary forfeiture penalty is that "[t]he actions of the FCC agent substantially burdened Petitioners' U.S. Constitutional rights of free exercise of religion ... because it makes one choose between his religion and compliance with a government request." The owner of the station stated that she could neither authorize nor be present for an inspection of the station because she was observing a religious holiday that directed that she refrain from working. Jan Mar also explains that the operator of the radio station "had neither the experience nor the authority to perform those duties" related to the FCC's request to inspect the station.

7. Section 90.439 of the FCC's rules requires, in part, that "[a]ll stations and records of stations ... shall be made available for inspection ... any time while the station is in operation."[1] 47 C.F.R. Section 90.439. This rule is based on Section 303(n) of the Communications Act of 1934 which provides that the FCC has "authority to inspect all radio installations associated with stations ...." 47 U.S.C. Section 303(n). The FCC's Review Board, in discussing this rule, stated that "[i]mmediate on-the-spot inspections are neces-

[1] Section 90.437 of the FCC's rules also requires that a copy of a station's license "be posted at every control point of the station." 47 C.F.R. Section 90.437.

sary. Any delay ... can result in changed conditions of the transmitting equipment or its operation, adversely affecting the efficiency of inspections." *Ralph Yago*, 35 FCC 113, 125 (Rev. Bd. 1963).

8. If a person is operating a radio station, this person has a duty to comply with the FCC's rules, including the inspection rule. Thus, a person operating a station is required to take steps to ensure that the station will be available for inspection by the FCC if requested. Since Jan Mar's owner elected to operate the station on September 28th, the station was subject to the inspection requirement of Section 90.439 of the FCC's rules. There is no requirement in the rule that the owner of a station be present for an inspection, and there was no attempt by the FCC inspector to require this.[2] The most relevant facts in this forfeiture proceeding are that the station was operating and that the FCC had reasonable grounds to inspect the station based on a complaint of unlicensed operation and interference. The presence or absence of the owner of the radio station during the inspection is not relevant. Likewise, the fact that it was a religious holiday is not relevant. Jan Mar cannot unilaterally exempt itself from the FCC rules or read provisions into a rule to qualify the application of a rule.

9. Contrary to Jan Mar's claim, the FCC's request to inspect the station on a religious holiday did not violate the Constitutional First Amendment right of the free exercise of religion. U.S. CONST. amend. I. The Supreme Court has held that there is no violation of freedom of religion if a generally applicable and otherwise valid law has an incidental effect on the free exercise of religion provided that the object of the law is not to prohibit the exercise of religion. Furthermore, an individual's religious belief does not excuse him from complying with an otherwise valid law regulating conduct that the government has authority to regulate. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990), *rehearing denied*, 496 U.S. 413 (1990).[3]

10. Jan Mar, moreover, claims that the monetary forfeiture penalty should be reduced because of its "good faith" in telling the FCC inspector that the radio station could be inspected on another day. As previously explained, it is the FCC's policy to conduct immediate on-the-spot inspections without any delay. Thus, allowing an inspection by appointment does not constitute "good faith" to justify a reduction of the forfeiture.

11. Jan Mar also requests a reduction in the penalty because it "has a history of full compliance." Accordingly, the monetary forfeiture penalty is reduced from $7,500 to $6,000 because of lack of evidence of past violations.

IV. CONCLUSION

12. For the above reasons, the monetary forfeiture penalty is reduced from $7,500 to $6,000, and the imposition of this penalty is affirmed. In determining the amount of the penalty, the FCC's policy regarding the assessment of monetary forfeiture penalties was taken into consideration. *1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382 (released: August 12, 1992). No further adjustments in the penalty appear warranted.

V. ORDERING CLAUSES

13. IT IS ORDERED pursuant to Section 503 of the Communications Act, 47 U.S.C. Section 503, and Section 1.80 of the rules, 47 C.F.R. Section 1.80, that Jan Mar FORFEIT to the United States six thousand dollars ($6,000) for the willful violation of Section 90.439 of the FCC's rules.

14. IT IS FURTHER ORDERED that Jan Mar pay the $6,000 within 30 days of this Order. Payment may be made by check or money order payable to the Federal Communications Commission. Please place NAL #215 LA 0068 on the remittance and send it to:

Federal Communications Commission

Post Office Box 73482

Chicago, Illinois 60673-7482

15. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Jan Mar Courier, Inc., 7551 W. Sunset Boulevard, Suite 205, Los Angeles, CA 90048; and to The Honorable Anthony C. Beilenson, U.S. House of Representatives, 21031 Ventura Boulevard, #1010, Woodland Hills, California 91364.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[2] Since the owner objected to the inspection, the FCC inspector suggested that the owner might wish to come to the radio station to oversee the inspection for the owner's peace of mind. The FCC inspector did not insist that the owner come to the station, and he did not condition his inspection on the presence of the owner at the station.

[3] Jan Mar also claims that "Government interference with one's freedom to exercise religion can only be justified by the least restrictive means of furthering a compelling government interest." However, the compelling government interest test does not apply to laws challenged solely because they interfere with freedom of religion. *Smith*, 494 U.S. at 883-89. Jan Mar further states that the FCC's interest was satisfied by the FCC inspector "rendering the radio system inoperative." This is factually incorrect. The FCC inspector made no attempt to make the radio inoperative, and before he left, he asked the operator to conduct test transmissions to ensure that the radio was operating properly, which the operator did.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-347

In the Matter of

Amendment of Part 73 of the
Commission's Rules to Modify
Processing Procedures for
Commercial FM Broadcast
Applications

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1993; Released: October 20, 1993

By the Commission:

1. In July 1992 the Commission modified the strict "hard look" application processing system used in the commercial band of the FM radio service.[1] The new approach, which is more lenient, gives applicants the opportunity to correct what were previously considered uncorrectable defects fatal to their applications. The new approach is applicable to all applications that are of sufficient completeness to satisfy a new "minimum filing requirement." The Association of Federal Communications Consulting Engineers (AFCCE) filed a timely Petition for Reconsideration of this action.[2] AFCCE, while generally supporting our modification of the "hard look," believes that our new minimum filing requirement errs in allowing applicants to correct the omission of certain engineering data.

BACKGROUND

2. The old "hard look" system was used for approximately seven years beginning in 1985. It was designed to enable the staff to process applications with a reasonable speed of service at a time when the Commission was receiving large numbers of commercial band FM applications, a high percentage of which were carelessly prepared and/or speculative. Under the old "hard look" system, the staff applied rigorous standards to applications and provided extremely limited opportunity for curative amendment of defects. This resulted in return or dismissal of applications containing any one of approximately two dozen enumerated defects in the application's "tenderability" (*i.e.* substantial completeness) or "acceptability" (*i.e.* compliance with core legal and engineering requirements) after close of the relevant filing period.[3]

3. The Commission modified the "hard look" approach, effective August 7, 1992, to make it less stringent. This was deemed desirable as a result of improved quality and decreased quantity of commercial band FM applications, as well as the Commission's adoption of other measures to discourage speculation in broadcast proceedings. Under the modified approach in place today, applicants must initially satisfy a two-tiered minimum filing requirement which is based on the hard look's tenderability standards. To satisfy the two-tiered requirement an application must contain all six elements enumerated in "Tier One" and at least ten of the 13 elements enumerated in "Tier Two."[4] Applications that do not meet this minimum filing requirement are returned without an opportunity to amend. Applicants who satisfy this minimum filing requirement but who nevertheless have not met all "hard look" tender and acceptance criteria receive a deficiency letter giving them an opportunity to bring their application into compliance with the "hard look" criteria.

PETITION FOR RECONSIDERATION

4. The only issue raised on reconsideration is whether certain engineering deficiencies currently included in Tier Two of the minimum filing requirement (which potentially can be corrected if there are no more than three such deficiencies) are of such importance that they should be reclassified as Tier One requirements (making any omission of this data fatal). The engineering data at issue involves Tier Two requirements 5 and 6 concerning antenna radiation center elevation above mean sea level, total struc-

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[1] *See Report and Order*, Processing Procedures for Commercial FM Broadcast Applications, MM Docket No. 91-347, 7 FCC Rcd 5074 (1992). The "hard look" and modified "hard look" processing systems apply to commercial and non-commercial entities seeking to construct radio stations on channels 221 to 300 in the commercial FM band. Non-commercial applicants operating on "reserved" (non-commercial) band channels 200 to 220 are subject to different processing rules.

[2] Petition for Reconsideration of the AFCCE, MM Docket No. 91-347 (filed September 8, 1992). The Petition was timely filed pursuant to 47 C.F.R. Sections 1.429(d) and 1.4(b)(3) and (j). Because the 30th day after Federal Register publication fell on the Labor Day holiday, AFCCE's submission on the following business day was timely.

[3] For examples of tender and acceptance requirements see *Report and Order*, 7 FCC Rcd 5074, notes 9, 10, and Appendix D.

[4] *See Report and Order*, 7 FCC Rcd 5074, 5081-82 (Appendix C). Under Tier One requirements applications must include each of the following: (1) applicant's name and address, (2) applicant's original signature, (3) principal community, (4) channel or frequency, (5) class of station, and (6) transmitter site coordinates. Applications satisfying Tier One proceed to Tier Two, under which no more than three of the following 13 requirements may be deficient: (1) applicant's interests in other broadcast stations and applications, (2) applicant's relatives and their interests in other broadcast stations and applications, (3) certification of compliance with 47 U.S.C. Section 310(b) regarding interests of aliens and foreign governments, (4) certification of financial ability to construct and operate, (5) tower and antenna heights, (6) effective radiated power, (7) antenna (directional or non-directional), (8) contour protection for short-spaced assignments, (9) transmitter site map meeting all requirements, (10) coverage map meeting all requirements, (11) tower sketch, (12) certification of compliance with local public notice requirements, (13) certification of site availability.

ture elevation, and effective radiated power.[5] AFCCE argues that this information is too critical to be completely missing.[6] AFCCE predicts that if we allow applicants to supply such missing data by amendment, we will encourage applicants to file incomplete and/or speculative applications which will lead to significant delays in the staff's processing of all commercial band FM applications.

DISCUSSION

5. When we modified the "hard look" processing approach in 1992, we too were concerned with the possibility that a lenient approach might cause a decrease in FM application quality and/or a reduced speed of processing. It was for this reason that we adopted the minimum filing requirement at issue today. We reasoned that under a minimum filing requirement applicants would have to make a reasonable effort to provide us with basic information, and that this requirement would therefore minimize the possible impact of our modified approach on application quality and speed of service. In selecting the elements included in Tier One of the requirement, we balanced our need for critical data to start our processing and our desire to be more flexible by allowing applicants additional leeway to correct some mistakes and oversights.

6. AFCCE's Petition for Reconsideration, filed shortly after adoption of the new rules, expresses the association's disagreement with the Commission's reasoning. We believe, however, that we achieved a proper balance and that AFCCE has not demonstrated otherwise. Although the engineering data that AFCCE identifies is essential, a few errors or omissions in this information can be tolerated at the early stages of processing to allow for greater flexibility of the system as a whole.

7. The modified "hard look" system has now been in use for approximately one year and, in our experience, is working well. We have not received the speculative applications that AFCCE predicted. Nor have there been processing delays as AFCCE anticipated. Although we now send letters to applicants giving them a chance to correct deficiencies, the resulting increased use of our resources is offset by a reduction in the number of Petitions for Reconsideration. The net result is no appreciable change in speed of service, due to a more effective and efficient process. Thus, we do not find a need to adopt AFCCE's proposal, and its Petition for Reconsideration will be denied.

ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the Petition for Reconsideration of the Association of Federal Communications Consulting Engineers IS DENIED.

9. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

10. For further information, contact Irene Bleiweiss at (202) 632-6485.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[5] The Commission combined the first two of these items under a single Tier Two requirement: "tower and antenna heights." While the Petition also refers to the importance of two other engineering requirements (channel or frequency; and transmitter site coordinates), these items are already included in Tier One, making any omission of these items fatal.

[6] AFCCE does, however, believe that the Commission should permit amendment of this data in cases of inconsistency or error. AFCCE would, for example, permit amendment of this information if an elevation dimension on a tower sketch is different from that shown on the application form or if tower elevation dimensions do not add up properly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
WESTERN UNION INTERNATIONAL, INC., and
TELECOM*USA, INC.,
Complainants,

v.

U S WEST COMMUNICATIONS, INC.,
Defendant.

File No. E-93-102

ORDER

Adopted: October 13, 1993; Released: October 20, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 23, 1993, MCI Telecommunications Corporation, Western Union International, Inc. and Telecom*USA, Inc. ("Complainants") filed the above-captioned complaint against U S WEST Communications, Inc. (U S WEST) seeking damages resulting from U S WEST's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On September 30, 1993, however, Complainants and U S WEST filed a joint motion to dismiss the complaint stating that Complainants have settled all claims against U S WEST in this proceeding and requesting that the above-captioned complaint be dismissed with prejudice.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 20, 1993

SOUTHERN NEW ENGLAND TELEPHONE COMPANY FILES PETITION FOR WAIVER OF SECTION 32.27 OF THE COMMISSION'S RULES

PUBLIC COMMENT INVITED

On September 30, 1993, Southern New England Telephone Company (SNET) filed a petition for waiver of Section 32.27 of the Commission's rules. These rules set forth the terms under which local exchange carriers may engage in transactions with their affiliated companies. SNET requests a waiver of these rules to allow it to engage in affiliate transactions under terms that are not provided for under the rules.

Parties may file comments on SNET's petition for waiver no later than **November 19, 1993**. Replies should be filed by **December 6, 1993**. Comments should reference AAD 93-124. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 20, 1993

CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENTS INVITED

Several local exchange carriers filed proposed revisions to their cost allocation manuals (CAMs) for the separation of regulated and nonregulated costs for the quarter ended September 30, 1993. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

Ameritech Operating Companies (Ameritech)	AAD 93-108
Bell Atlantic	AAD 93-109
BellSouth Corporation (Bell South)	AAD 93-110
Cincinnati Bell Telephone Company	AAD 93-112
GTE	AAD 93-113
Lincoln Telephone	AAD 93-114
Nevada Bell	AAD 93-115
NYNEX Telephone Companies	AAD 93-116
Pacific Bell	AAD 93-117
Puerto Rico Telephone Company	AAD 93-118
Rochester Telephone	AAD 93-119
Southern New England Telephone Company	AAD 93-120
Southwestern Bell	AAD 93-121
U S West, Inc.	AAD 93-123

The CAM revisions filed by Ameritech and BellSouth include revisions to implement CAM Uniformity as required by a Common Carrier Bureau (Bureau) Order released July 1, 1993 (8 FCC Rcd 4664). These revisions to reflect CAM uniformity requirements are not required to be filed until November 1, 1993. On October 8, 1993, BellSouth also filed an erratum to its CAM revisions.

The following companies filed letters stating there were no changes to their CAMs for the quarter ended March 31, 1993.

Central Telephone Company	AAD 93-111
United Telephone	AAD 93-122
American Telephone & Telegraph Company	AAD 93-107

Parties may file comments on the proposed revisions to the CAMs no later than **November 19, 1993**. Replies should be filed by **December 6, 1993**. Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

KEITH BUSSMAN File No. I-T-D-93-014

Application for authority to
close public coast station KSK346,
South Lake Tahoe, California.

ORDER AND AUTHORIZATION

Adopted: October 8, 1993; Released: October 22, 1993

By the Chief, International Facilities Division:

1. The above-captioned application filed on July 29, 1993 by Keith Bussman requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from public coast station KSK346, South Lake Tahoe, California. The station provides marine service to Lake Tahoe in California and Nevada. The application was placed on public notice on August 18, 1993. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of his application, Mr. Bussman states that traffic via the station has declined significantly in the recent past. In the past two years the station has handled less than two calls per month. Adequate service is available in the area via cellular communications. Further, the U.S. Coast Guard maintains safety and distress communications services throughout the entire coverage area of applicant's site.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversley affected by the discontinuance of service via public coast station KSK346.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-93-014 IS GRANTED, and Keith Bussman is authorized to discontinue service via public coast station KSK346.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.114 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-93-289

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communication between the United States and the Pan American Satellite System for the provision of private line service not interconnected with the public switched network between the U.S. and Argentina

ORDER AND AUTHORIZATION

Adopted: October 12, 1993; Released: October 22, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by MCI Telecommunications Corporation (MCI) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-289 IS GRANTED and MCI is authorized to:

a. acquire by lease from PanAmSat and operate one (1) T-1 circuit between the PAS-1 earth station in Homestead, Florida and the PAS-1 satellite, connecting with matching facilities provided by TELINTAR, MCI's correspondent in Argentina;[1]

b. obtain from PanAmSat units of capacity in the Homestead, Florida earth station; and

c. use the above facilities for the provision of private line service not interconnected with the public switched networks between the U.S. and Argentina.[2]

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines is limited to the provision of such private lines only between the United States and Argentina – that is, private lines which originate in the United States and terminate in Argentina, or which originate in Argentina and terminate in the United States. In addition, MCI may not – and MCI's tariff must state that its customers may not – connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. IT IS FURTHER ORDERED that MCI shall file a copy of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

6. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, before adding any circuits or channels of communication for the provision of service over the PAS-1 satellite.

7. This order shall not be construed as permitting the provision of any services between earth stations located within the United States.

8. This order is issued under Section 0.291 of the Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] MCI's application originally requested authority to provide private line service not interconnected with the public switched between the U.S. and all countries PAS-1 is authorized to serve. By letter dated August 13, 1993, MCI amended its application to request service only between the U.S. and Argentina.

[2] The existing INTELSAT Article XIV(d) consultation for the use of PAS-1 between the U.S. and Argentina is for C-band service only. Accordingly, this authorization is for C-band service only.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-93-299

Application for authority to acquire and operate facilities for service between the U.S. and Brunei.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 8, 1993; Released: October 22, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Brunei by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-299 IS GRANTED and MCI is authorized to:

a. lease from Comsat and operate 10 voice-grade satellite circuits between the Yacolt, Washington earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Brunei furnished by MCI's correspondent in Brunei;

b. own and operate 10 voice-grade circuits in the Yacolt earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate 10 voice-grade connecting circuits between the Yacolt earth station and MCI's Dominguez Hills, California operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S. and Brunei.

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines as part of its regularly authorized services is limited to the provision of such private lines only between the United States and Brunei -- that is, private lines which originate in the United States and terminate in Brunei or which originate in Brunei and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Brunei end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Brunei affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. IT IS FURTHER ORDERED that MCI shall file a copy of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. Section 63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 22, 1993

NATIONAL EXCHANGE CARRIER ASSOCIATION FILES PETITION FOR AUTHORIZATION TO PERFORM ADDITIONAL SERVICES

COMMENTS DUE: NOVEMBER 22, 1993
REPLY COMMENTS DUE: DECEMBER 8, 1993

On September 10, 1993, the National Exchange Carrier Association, Inc. (NECA) filed a petition requesting Commission authorization to add additional services. NECA requests Commission authorization to expand its current telecommunications training program on access tariffs and the revenue distribution process to include new telecommunications technologies, customer applications, the regulatory environment and changes in industry structure. NECA contends that the additional training would enable small LECs to make informed business decisions.

NECA also requests Commission authorization to share telecommunications information with foreign countries, including information on the United States federal access charge system, the pooling and universal service fund mechanisms, the deployment of telecommunications services in rural areas, and the ongoing development of a nationwide telecommunications infrastructure. Lastly, NECA requests permission to allow Independent NECA Services, Inc. (INS), NECA's wholly owned subsidiary, to provide, for other programs, the same agency and administrative services that it now provides for local exchange carrier (LEC) billing and collections activities. For example, NECA states that INS would negotiate contracts for LECS to buy customized direct communications packages that would assist LECs in marketing their services to local subscribers. NECA believes that allowing INS to negotiate contracts for hundreds of small LECs would enable the LECs to obtain access to new services and products at lower costs.

Interested parties may file comments on NECA's petition no later than November 22, 1993. Replies should be filed no later than December 8, 1993. Comments and replies regarding the petition for authorization should reference file number AAD 93-126. All comments and replies in this proceeding should be sent to Helene T. Schrier, FCC, Common Carrier Bureau, 2000 L Street N.W., Room 257, Washington, D.C. 20036, and to the International Transcription Service, Inc. (ITS), 2100 M Street, N.W. Suite 140, Washington, D.C. 20037. Copies of the petition for authorization may be obtained from ITS at (202) 857-3800.

For further information contact Helene T. Schrier at (202) 632-7500.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 13, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON THE MOTION FOR RECLASSIFICATION OF AT&T AS A NONDOMINANT CARRIER

CC Docket No. 79-252

On September 22, 1993, the American Telephone and Telegraph Company (AT&T) filed a motion requesting that the Commission reclassify AT&T as a nondominant carrier.

AT&T states that at the time it was classified as dominant, it owned nearly 80% of this nation's bottleneck local facilities, and its competitors, though financially sound and able, were "infant[s]" that lacked "maturity." AT&T states that circumstances have clearly and dramatically changed and that it no longer meet the criteria for dominance regulated by the FCC.

AT&T notes that since being classified as dominant, it has divested itself of the Bell System's bottleneck local facilities. AT&T states that there are now hundreds of interexchange carriers, several of which have constructed their own nationwide fiber-optic networks over which they provide a complete array of business, residential, domestic and international services in competition with AT&T. AT&T states that its competitors include some of this nation's largest enterprises, with billions of dollars in assets and revenues. It states that the FCC has characterized interexchange competition as "thriving" and "robust."

AT&T argues that continuing to classify AT&T as dominant, or regulating AT&T as if it were a dominant carrier, is not merely unnecessary, but counterproductive. AT&T states that such regulation imposes direct costs on carriers and customers and wastes Commission resources that should instead be utilized in areas where regulation may be more appropriate, such as the local exchange and opening foreign markets.

AT&T argues that AT&T should be classified as nondominant, and regulated in the same manner as its interexchange competitors.

Interested parties are to file comments on this motion by **November 12, 1993**, and reply comments by **December 3, 1993**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the motion can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Gary Phillips Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4048.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-266

In the Matter of

Implementation of Sections of
The Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ORDER

Adopted: October 7, 1993; Released: October 7, 1993

By the Chief, Mass Media Bureau:

1. Cablevision Industries Corporation and Comcast Corporation (the "Joint Parties") have filed a petition seeking an extension of the time in which to submit reply comments to the Third Notice of Proposed Rulemaking[1] in the above-captioned proceeding. Comments were filed on or before September 30, 1993. Reply Comments are due October 7, 1993. The Joint Parties state that an additional ten days is necessary to respond to comments filed by other parties to this proceeding. Joint Parties state that a total of seventeen days is necessary to properly review, and, if necessary, present additional facts to support or oppose other parties' positions.

2. The time periods for filing comments and reply comments Third Notice of Proposed Rulemaking provided thirty-four days in which to file comments and an additional seven days for reply comments. The Joint Parties have failed to provide any support or documentation showing that additional time for filing reply comments is necessary in order to provide a reasonable opportunity to meaningfully participate in this proceeding. In addition, the requested extension could unduly delay the expeditious resolution of issues in this proceeding. Further, extensions of time are not routinely granted.[2] We will therefore deny the Joint Parties' request. We note that the Commission's rules provide for presentation of views after the period for filing comments and reply comments.[3]

3. Accordingly, IT IS ORDERED, that the Request For Extension Of Time filed by the Joint Parties IS DENIED.

[1] *Third Notice of Proposed Rulemaking*, FCC 93-428, 58 FR 46737 (9/2/93); *See also, Erratum*, MM Docket No. 92-266 (released 9/2/93).

[2] *See* Section 1.46(a) of the Commission's rules, 47 C.F.R. § 1.46(a).

[3] *See* Section 1.1200 *et seq.* of the Commission's rules, 47 C.F.R. §§ 1.1200 *et seq.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Section 76.64 for
EMI Communications Corp.

ORDER

Adopted: October 5, 1993; Released: October 5, 1993

By the Chief, Mass Media Bureau:

1. On March 11, 1993, the Commission adopted a *Report and Order*[1] in MM Docket No. 92-259 to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").[2] On September 8, 1993, EMI Communications, Inc. ("EMI") filed a Request for Waiver requesting immediate relief on behalf of its cable system customers, from the provision of Section 76.64(b)(2) regarding an exception to the retransmission consent provisions (the "superstation exception").[3]

2. Section 76.64(b)(2) of the retransmission consent rules states that a commercial broadcast signal may be retransmitted without express authority of the originating station if the cable system obtains the signal from a satellite carrier and the originating station was a superstation on May 1, 1991.[4] The Chief of the Mass Media Bureau, in an *Order* adopted August 18, 1993, granted a waiver of this provision of the rule with respect to cable systems served by Yankee Microwave, Inc. In that *Order* we stated that the waiver was being granted based upon Yankee's evidence to the Commission of the imminent loss of a large percentage of Yankee's microwave business,[5] as well as to provide Yankee with an opportunity to continue its retransmission consent negotiations with WSBK-TV.[6] We noted specifically that WSBK-TV had stated in its comments that it did not object to Yankee's request.

3. We find the circumstances involved in EMI's waiver request to be substantially and materially different from the Yankee request. First, EMI has not provided the Commission with sufficient evidence of imminent harm. Second, EMI has not stated that it is in the process of, or has made attempts to secure retransmission consent from any of the affected stations. Third, unlike Yankee, EMI has provided no evidence of agreement to or support for EMI's request from any of these stations. Fourth, the waiver granted to Yankee involved six cable systems' retransmission via microwave of one superstation in fourteen communities. By contrast, the EMI request involves approximately twenty-seven cable systems' retransmission of three superstations to forty-seven communities, which is of significantly broader scope than the Yankee request. Fifth, the Yankee request demonstrated the imminent loss of more than 70% of Yankee's business. The EMI request involves approximately 19% of EMI's stated business.[7] Finally, the balance of EMI's request merely reiterates arguments contained in the pending petitions for reconsideration.

4. We find that EMI has failed to present sufficient evidence in support of its request. EMI has not provided the Commission with an adequate showing of imminent harm nor with any evidence that it either has the support of the affected superstations or that it has made any attempt to obtain retransmission consent from these stations. Accordingly, we are denying a waiver of Section 76.64(b)(2) of our rules.

5. Accordingly, IT IS ORDERED that pursuant to Section 4(i) and 4(j) of the Communications Act of 1934, as amended, the request of EMI Communications Corp. for a waiver of Section 76.64(b)(2) of the Commission's Rules IS DENIED.

6. For further information on this proceeding, contact Elizabeth W. Beaty, Mass Media Bureau, (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd 2965 (1993). *See also, Clarification Order,* 8 FCC Rcd 4142 (1993), and *Order,* 58 FR 40366 (July 28, 1993).

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§4-6, 106 Stat. 1460 (1992).

[3] EMI's parent corporation, Newhouse Broadcasting ("Newhouse"), filed a petition for reconsideration in this proceeding which requests a revision of Section 76.64(b)(2) to extend this exception to microwave carriers, as well as satellite carriers of a superstation signal. In addition, petitions for reconsideration filed by Yankee Microwave, Inc. ("Yankee"), the National Cable Television Association ("NCTA") and an Opposition filed by the Association of Independent Television Stations ("INTV") have also requested that Section 76.64(b)(2) be revised. Yankee filed comments in support of EMI's waiver request.

[4] *See* 47 C.F.R. § 76.64(b)(2).

[5] Yankee filed supplemental pleadings which contained copies of letters from various cable systems stating that they would discontinue Yankee's microwave delivery of WSBK-TV, and change to satellite delivery, because satellite delivery of that signal does not require retransmission consent. *See Order,* DA 93-1013, released August 18, 1993.

[6] Yankee stated that they were in the process of negotiating for consent from WSBK-TV on behalf of their cable systems, but had not yet come to terms with WSBK-TV.

[7] We do not minimize the stated impact of denying the waiver but simply note the significant distinctions between the two requests.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-311

In re Applications

SALT CITY COMMUNICATIONS, INC. File No. BPH-870918MN

D.J.'S BROADCASTING CO. File No. BPH-870918MY

For Construction Permit for a
New FM Station on Channel 290A,
Syracuse, New York

Appearances

David Honig, Esquire, on behalf of Salt City Communications, Inc.; and *Dennis J. Kelly, Esquire*, on behalf of D.J.s Broadcasting Co.

SUPPLEMENTAL DECISION

Adopted: October 4, 1993; Released: October 25, 1993

By the Review Board: MARINO (Chairman) and GREENE. Board Member BLUMENTHAL Absent.

Board Member GREENE:

1. In a *Decision* in this proceeding, *Salt City Communications, Inc.*, 7 FCC Rcd 4221 (Rev. Bd. 1992), the Review Board disqualified Salt City Communications, Inc. (Salt City) on a financial issue and awarded the construction permit to D.J.'s Broadcasting Co. (D.J.), the only remaining applicant, without reaching the comparative issue or D.J.'s contentions that a real-party-in-interest issue should have been added against Salt City. By *Memorandum Opinion and Order, Salt City Communications, Inc.*, 8 FCC Rcd 683 (1993), the Commission reversed the Board's disqualification of Salt City on financial grounds, set aside the Board's *Decision*, and remanded the proceeding to the Board for consideration of the remaining exceptions. In that posture, the case is now back before the Board. We have reviewed the pertinent portions of the record not previously considered, and conclude that the *Initial Decision* (*I.D.*), 6 FCC Rcd 7160 (1990) of Chief Administrative Law Judge Joseph Stirmer (ALJ) should be affirmed and the construction permit awarded to Salt City.

Real-Party-In-Interest Issue

2. In a motion to enlarge issues filed with the ALJ on April 24, 1990, D.J. sought a real-party-in-interest issue against Salt City. The proposed issue was premised on the fact that the financial arrangements between Salt City and its proposed lender, Minority Broadcast Investment Corporation (MBIC), included a provision permitting MBIC to acquire stock warrants representing 75% of the equity of the applicant. In addition, D.J. asserted that Walter L. Threadgill, the president of MBIC, had been retained by Salt City as a consultant regarding settlement. Consequently, D.J. argued, MBIC and/or Threadgill was a real-party-in-interest in the Salt City application. The ALJ, by *Memorandum Opinion and Order*, FCC 90M-1778, released June 22, 1990, denied the motion to enlarge, pointing out preliminarily that the already-designated financial issue would permit inquiry into the MBIC-Salt City financial relationship. As to the specific real-party-in-interest allegations, the ALJ stated that the warrants only pertained to non-voting stock, that the arrangements were not unusual, and that Mr. Threadgill's retention for settlement purposes did not in itself demonstrate that he will control or influence the operation of the station. We agree.

3. The test traditionally applied for determining whether a third party is a real-party-in-interest is whether that person has an ownership interest, or will be in a position to exercise actual or potential control over the operation of the station. *San Joaquin Television Improvement Corporation*, 2 FCC Rcd 7004, 7008 (1987). In applying this test, we consider the particular facts presented to determine whether the individual has played or is likely to play a role equivalent to that of an owner. *Edward F. and Pamela I. Levine*, 8 FCC Rcd 2630, 2635 (Rev. Bd. 1993). Here, MBIC and its president, Threadgill, have no ownership interest in Salt City and are only in the position of lending funds to the applicant. The stock warrants represent a potential interest in strictly non-voting stock, and we have previously indicated that even where a lender to an applicant receives in return a warrant convertible to common stock, the lender's assignee will not be regarded, by virtue of these facts alone, as a real-party-in-interest to the application. *See Barry Skidelsky*, 7 FCC Rcd 1, 2-4 (Rev. Bd. 1992). Moreover, as will be seen in the integration analysis, *infra* para. 7, D.J. did not make a *prima facie* showing, as was its burden, that the warrants were likely to be converted by MBIC. *See Signal Ministries, Inc.*, 104 FCC 2d 1481, 1491 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 1259 (1987), *aff'd mem. sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F. 2d 571 (D.C. Cir. 1988)(Table). Furthermore, in a sworn declaration attached to Salt City's opposition to D.J.'s motion to enlarge, Threadgill, MBIC's president, explained that the warrants provision in the March 21, 1990 letter to Salt City reflected financial conditions in broadcast markets at that time; that the terms were consistent with those used by other MESBICs; that MBIC has never attempted to exercise control over any broadcast venture it has financed; and that even if it exercised its warrants in this case, he understood his lack of voting power to mean MBIC could not be actively involved in the management or operation of Salt City. *See* Opposition, filed May 18, 1990, Exhibit 2, pp. 1-5. Finally, we agree with the ALJ that it is purely speculative to assume Threadgill will control the applicant merely because he agreed to serve as a consultant and provide financial advice for the limited purpose of possible settlement negotiations. *See id.* at p.6.

4. Insofar as D.J.'s motion to enlarge raised other matters not pursued in its exceptions or its exceptions raise matters not presented first to the ALJ, only brief additional comment is required. *See* 47 CFR § 1.277(a) (exceptions must point out with particularity alleged errors in the ALJ's ruling, and objections not saved by specific exception are waived.) Thus, although D.J.'s motion to enlarge also sought financial and financial misrepresentation issues

premised on a claim that MBIC's financing letter to Salt City was a "worthless accommodation," the ALJ, as noted, had already specified a financial issue to explore the Salt City-MBIC financial relationship and, as indicated, the Commission ultimately resolved this issue in the applicant's favor. In finding Salt City to be financially qualified, the Commission agreed with the Board that the 1987 commitment letter was not a mere accommodation. *Salt City Communications, Inc.*, 8 FCC Rcd at 684. As to D.J.'s new claim in its exceptions that Salt City did not disclose the warrants in a timely fashion in violation of the applicant's 47 CFR § 1.65 obligation to report a change in its financial proposal, the warrants provision did not arise until a second letter was issued to Salt City on March 21, 1990, and Salt City amended its application to report this information eight days later.[1] In any event, the Commission expressly affirmed the Board's finding that "the second letter did not materially modify the original agreement" reached in 1987. *Id.* at 683 n.1. Thus, no significant change in financing, let alone a loss of financing, occurred, and there is no basis for addition of a reporting issue. *Cf. Texas Communications Ltd. Partnership*, 7 FCC Rcd 8186, 3187 (1992)(where applicant relied on letter from bank that became insolvent, it was required to amend its application in order to rely on replacement letter from new bank).[2]

Comparative Issue

5. Salt City is a two-tier corporation in which Merrill B. Charles, the president of the applicant, is the 100% voting shareholder. Charles proposes to be integrated full time as general manager responsible for all management, administrative, budgetary, and programming decisions relating to the operation of the station. *I.D.*, 6 FCC Rcd at 7176, paras. 53-55. The ALJ awarded Salt City 100% integration credit. *Id.* at 7176, para. 132. D.J. is a general partnership consisting of four equal partners, three of whom propose to be integrated on a full-time basis in positions recognized by the Commission as managerial. *Id.* at 7171-72, paras. 89-91, 95, 97. The ALJ awarded D.J. 75% integration credit. *Id.* at 7176, para. 132. D.J. does not except to the level of credit it received. On the basis of the disparity in their respective credits, it is apparent that Salt City prevails quantitatively over D.J. without the need to consider the applicants' respective qualitative enhancements. *See Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1096 (Rev. Bd. 1982); *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981). Moreover, we agree with the ALJ that if the qualitative differences were considered, Salt City would still prevail on the strength of its minority ownership, local residence coupled with strong civic involvement, and broadcast experience. *See I.D.*, 6 FCC Rcd at 7176, para. 132.

6. To undermine Salt City's comparative advantages, D.J. argues that its opponent's integration proposal should be discredited because: (a) its two-tier corporate structure is in a state of flux; (b) MBIC and Threadgill will not be insulated owners; and (c) Salt City did not timely report Charles' 1991 consultancy employment with station WOLF(AM), Syracuse, and thus Charles cannot be presumed to be able to effectuate his full-time commitment to the proposed station. We reject these contentions.

7. D.J.'s attack on Salt City's corporate structure derives from the fact that Salt City has amended its application to change the percentage of equity ownership among its shareholders and to eliminate one of the original non-voting owners. *See I.D.*, 6 FCC Rcd at 7165-66, paras. 50-52. These amendments, however, did not alter Salt City's basic corporate structure which has always had two classes of stock. More importantly, the fact remains that Charles has at all times since the inception of the Salt City application retained 100% voting control as Salt City's sole voting stockholder and only individual making decisions on behalf of the applicant, and the changes in non-voting ownership and equity percentages have not affected the exclusive control upon which his integration claim is based.[3] The allegations concerning MBIC and/or Threadgill in connection with the warrants and consultancy agreement are the same as those discussed under the real-party-in-interest issue. We note, first, that the March 21, 1990 letter creating the warrants clearly provides that they only pertain to non-voting stock. *I.D.*, 6 FCC Rcd at 7168, para. 72. Thus, their exercise would not alter Salt City's basic corporate structure. *See generally Cleveland Television Corp. v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984)(corporate structure "will not be overlooked without an adequate showing that in practice the corporation is a sham."). Furthermore, the March 21, 1990 letter expressly allows Salt City to opt out of the loan agreement and seek financing elsewhere upon payment of a $100,000 fee to MBIC. *I.D.*, 6 FCC Rcd at 7168, para. 72. Should Salt City ultimately proceed with MBIC, a clarifying letter of June 20, 1990 explains that put and call provisions give Salt City the right to purchase some or all of the warrants and MBIC the right to require Salt City to buy some or all of the warrants. *Id.* at 7169, para. 81. Even if Salt City did not buy back the warrants pursuant to the put/call provisions, MBIC could not exercise the warrants for a period of three years after the station goes on the air in accordance with Small Business Administration regulations, *Id.* at 7170, para. 84. And, as noted in our earlier discussion regarding real-party-in-inter-

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[1] Salt City's March 29, 1990 amendment was accepted by *Order*, FCC 90M-828, released April 17, 1990. *See* I.D., para. 51.

[2] In view of the discussion above, D.J.'s citation to *Las Americas Communications, Inc.*, 6 FCC Rcd 1507 (1991), which involved substantial questions of financial qualifications, repeated concealment, and rule violations, for the general proposition that an applicant must report a change in its financial proposal, is unhelpful. D.J.'s further reliance on ALJ orders which are not binding precedent on the Board and on cases involving the same counsel but entirely different factual circumstances, such as *Edwin A. Bernstein*, 6 FCC Rcd 6841 (Rev. Bd. 1991) (issue added, *inter alia*, because loss of financing was not reported), and *Welch Communications, Inc.*, 4 FCC Rcd 3979 (Rev. Bd. 1989)(appeal of privilege claim in connection with bank letter rejected where privilege was waived), is also of no avail.

[3] D.J.'s reliance on *Pacific Television, Ltd.*, 2 FCC Rcd 1101, 1103-04 (Rev. Bd. 1987), *rev. denied*, 3 FCC Rcd 1700 (1988), for the proposition that Salt City's ownership arrangement is too "inchoate" to be credited, is misplaced. There, as here, the winning applicant had been formally incorporated and maintained a specific integration proposal all along from which it did not depart. "Where an applicant sets forth a specific integration proposal, does not depart from it, and provides reasonable assurance that it will be carried out, we will credit that proposal." *Bradley, Hand and Triplett*, 89 FCC 2d 657, 662 (Rev. Bd. 1982).

est, Threadgill's limited role as a consultant for settlement purposes does not give him a future role in Salt City's control or operation.[4] Given these circumstances, we agree with the ALJ that D.J.'s attribution arguments are speculative and unsupported. *See id.* at 7176, para. 129; *cf. Doylan Forney*, 3 FCC Rcd 6330, 6337 (Rev. Bd. 1988), *rev. denied*, 5 FCC Rcd 5423, 5427 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, 951 F.2d 1324 (D.C. Cir. 1991)(sole general partner's position as a director of Broadcap, which holds warrants to purchase non-controlling interests in some of the stations it finances, held "too remote and attenuated" to be attributed for comparative purposes).[5]

8. Finally, as to Charles' role as a self-employed broadcast consultant at WOLF(AM), Salt City amended its application to report this fact within thirty days of its becoming essentially a full-time summer position in July 1991, although it began on a part-time basis in February 1991, and the ALJ accepted the amendment by *Order*, FCC 91M-2721, released September 4, 1991. Charles pledged to resign from any full-time or part-time employment in order to effectuate his integration proposal. *See I.D.*, 6 FCC Rcd at 7166, paras. 56-57; *see also* Charles' Declaration under penalty of perjury, dated August 29, 1991, attached to Salt City's supplement to petition for leave to amend, filed September 3, 1991. We see nothing in these facts to remotely suggest that either Charles deliberately withheld significant information or that he will not be in a position to fulfill his integration commitment when the time comes.[6] *See Merrimack Valley Broadcasting, Inc.*, 99 FCC 2d 680, 683 n.9 (1984)(a reporting issue requires decisional significance, an intent to conceal, or a pattern or other significant carelessness); *Coast TV*, 4 FCC Rcd 1786 (1989)(subsequent history omitted)("it is unrealistic... to expect the status of the principals of an applicant to remain static during often lengthy proceedings"); *CR Broadcasting, Inc.*, 5 FCC Rcd 5348 (Rev. Bd. 1990)(applicant's enrollment in graduate program, which he could terminate at will, did not undermine integration pledge), *rev. denied*, 6 FCC Rcd 1384 (1991), *recon. dismissed*, 6 FCC Rcd 4180 (1991).

9. ACCORDINGLY, IT IS ORDERED That the application of Salt City Communications, Inc. (File No. BPH-870918MN) for a construction permit for a new FM station at Syracuse, New York IS GRANTED subject to the following conditions:

> That Merrill Charles will sever all connections with Station WOLF (AM) prior to the commencement of program test authority.
>
> Upon receipt or notification from the Commission that harmful interference is being caused by the operation of the licensee's (permittee's) transmitter, the licensee (permittee) shall either immediately reduce the power to the point of no interference, cease operation, or take such immediate corrective action as is necessary to eliminate the harmful interference. This condition expires after one year of interference-free operation.

10. IT IS FURTHER ORDERED, That the application of D.J.'s Broadcasting Co. (File No. BPH-870918MY) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

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[4] To date, there is no evidence that Threadgill has performed any consultancy services for Salt City, albeit three of the five applicants originally designated for hearing have since been dismissed. *See Marc A. Albert*, 6 FCC Rcd 13 (Rev. Bd. 1991), *rev. denied*, 6 FCC Rcd 2603 (1991); *Salt City Communications, Inc.*, 7 FCC Rcd at 4227 n.1.

[5] D.J.'s attempt to analogize Threadgill to the principal in *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3947, 3954-55 (Rev. Bd. 1988), who, while claiming passivity, dictated the most crucial terms of the limited partnership agreement and dominated the applicant, is preposterous.

[6] The ALJ placed a condition on Salt City's grant which required Charles to sever his ties with WTVH-TV (Channel 5), Syracuse, where he was employed as a photo journalist. Charles resigned that position in July 1991 when he began full-time work at WOLF(AM) for the summer. We will modify the condition to make it applicable to WOLF(AM).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 14, 1993

COMMISSION REQUESTS COMMENT ON PETITION FOR ASSIGNMENT OF N11 CODES TO FACILITATE ACCESS TO TELECOMMUNICATIONS RELAY SERVICES

IAD File No. 93-02

Comments Due: November 18, 1993
Reply Comments Due: December 8, 1993

In a joint petition filed October 1, 1993, the National Center for Law and Deafness and Telecommunications for the Deaf, Inc. (Petitioners), ask the Commission to adopt rules that would direct assignment or reservation of a uniform nationwide N11 number -- 711 -- to facilitate access by individuals with hearing and speech disabilities and other text telephone users to telecommunications relay services (TRS) and would also require assignment or reservation of a second unspecified N11 number for TRS access by voice telephone users.

Petitioners note the requirements of the Americans with Disabilities Act, Pub. L. 101-336 (1990), that common carriers provide TRS and they discuss implementation of those requirements by the Commission and the states. *See, e.g.,* Telecommunications Relay Services and the Americans with Disabilities Act of 1990, Third Report and Order, 8 FCC Rcd 5300 (1993). However, Petitioners contend that variations among and within states in the TRS telephone numbers currently assigned make access to those services difficult. Petitioners also claim that use of N11 numbers would reduce dialing time for TRS users and, thus, establish a TRS dialing scheme more comparable to the scheme currently available to conventional telephone users. Asserting that many states are considering assignment of N11 codes for commercial information services and that some states have already made such assignments on an experimental basis, Petitioners contend that delay by the Commission in directing assignment or reservation of N11 codes for TRS access might make future assignment, reservation, or recall of such codes difficult.

The Commission will accept comments on this petition and related issues. Initial comments should be filed on or before November 18, 1993, and reply comments should be filed on or before December 8, 1993. All comments should be filed with the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comment captions should include the above Industry Analysis Division (IAD) file number. The petition is available for inspection and duplication between the hours of 9:00 a.m. and 4:00 p.m. in the Public Reference Room of the Common Carrier Bureau's Industry Analysis Division, located at 1250 23rd Street, N.W., Plaza Level, Washington, D.C. Copies may also be obtained from International Transcription Service by calling (202) 857-3800.

For further information, contact Allen A. Barna, Industry Analysis Division, (202) 632-1370.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 15, 1993

VERMONT DEPARTMENT OF PUBLIC SERVICE, VERMONT PUBLIC SERVICE BOARD FILE PETITION FOR WAIVER OF SECTION 36.631 GOVERNING UNIVERSAL SERVICE FUND (USF) FUND DISPERSAL AAD 93-103

Comment date: November 5, 1993
Reply date: November 19, 1993

On September 21, 1993, the Vermont Department of Public Service and Vermont Public Service Board (Vermont) filed a petition for waiver of Section 36.631 of the Commission's rules, 47 C.F.R. Section 36.631, governing disbursement of moneys from the Universal Service Fund (USF). Vermont seeks waiver of that part of the rule that establishes a lesser funding level for local exchange carriers (LECs) that serve more than 200,000 lines. Vermont argues that grant of the requested waiver would enable the Commission to rectify some of the hardship and inequity caused by the current rule's application.

Parties may file comments on this petition no later than November 5, 1993. Replies should be filed by November 19, 1993. Comments should reference AAD 93-103. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554; to Deborah Dupont, Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, D.C. 20554; and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacky Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 19, 1993

ALASKA FEDERAL-STATE JOINT BOARD TO CONVENE AN OPEN MEETING TUESDAY, OCTOBER 26, 1993

CC DOCKET NO. 83-1376

The Alaska Federal-State Joint Board in CC Docket 83-1376 will convene an open public meeting on Tuesday, October 26, 1993, at 9:30 a.m. at the Federal Communications Commission, 1919 M St. N.W., Washington D.C. in Room 856. The meeting will be held to consider a Joint Board *Final Recommendation* addressing interstate telecommunications market structure issues for Alaska. Interested persons may attend the meeting.

Additional information concerning this meeting may be obtained from Rose Crellin, Common Carrier Bureau, FCC, at (202) 632-1292, or Kent Nilsson, Common Carrier Bureau, FCC, at (202) 632-1302.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325-7245

LETTER
September 30, 1993

Released: September 30, 1993

Genesis Perpetual Trust
112 Genesis Road
Crossville, TN 38555

In Reply Refer To:
7120-2

Dear Trustee:

Your applications for IVDS markets 001 through 010 filed September 13, 1993 in Pittsburgh were not received in time to be included in the Commission's IVDS lottery held at 10:00 AM, September 15, 1993. We note that you failed to comply with *inter alia*, two procedural requirements: 1) you did not file during an IVDS filing window, and 2) you did not file during the thirty day period provided in a Public Notice, DA 93-935, released July 23, 1993, 58 Fed. Reg. 4427 (July 28, 1993) for corrections to the list of lottery applicants. Further, the Commission, in a *Memorandum Opinion and Order*, Gen. Docket 91-2, adopted August 20, 1993 (attached) dismissed the applications filed by a trust under similar factual circumstances (except that the subject trust filed in time to be included in the lottery on a conditional basis pending the Commission's consideration of its timely filed Petition for Reconsideration in that proceeding). Therefore, consistent with the Commission's decision, your applications are dismissed. Your filing fee will be refunded in approximately six weeks.

Sincerely,

Walter Boswell
Acting Chief, Special Services Branch
Licensing Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-265

In re Application of

PINE TREE MEDIA, INC. File No. BR-900817UF

For Renewal of License of
Station KARW
Longview, Texas

HEARING DESIGNATION ORDER AND NOTICE OF FORFEITURE

Adopted: October 7, 1993; Released: October 25, 1993

By the Commission:

1. The Commission has before it for consideration the above-captioned application and materials related thereto.[1] Because substantial and material questions of fact exist with respect to possible unauthorized transfers of control of the licensee, the accuracy of a representation as to the identity of the renewal applicant, the station's unwillingness to respond to official correspondence, and the station's compliance with Commission Rules, we will designate for hearing the application for renewal of license of Station KARW (formerly KLGV).

Background

2. The licensee of record for Station KARW is Pine Tree Media, Inc. ("Pine Tree"). On November 10, 1988, the Commission granted an application to transfer control of Pine Tree from Herbert Wren and Earl Jones to Kenneth Tuck (File No. BTC-880930EG). Tuck, Wren and Jones reportedly consummated the transfer on December 12, 1988.[2]

3. On August 17, 1990, an application for renewal of license was filed for the station. The application showed that it was filed on behalf of "KLGV - Ken Tuck - Pine Tree Media, Inc." The application was signed by Robert D. Murray, general manager. However, according to the Commission's records, Murray is not an officer of Pine Tree.

4. In response to a complaint, Commission personnel subsequently inspected the station. The inspection disclosed that the station was being operated by Mssrs. H. E. Ferrell and Dub Murray on behalf of an entity identified as American Plastics. Documents at the station indicated that Ferrell and Murray paid employee wages and station utilities. Commission personnel learned that Tuck had died in May 1990, and that the lien which Wren and Jones had held with respect to a note made by Tuck in payment for the station had been transferred on May 17, 1990, to American Plastics. The inspection further revealed that the station's public file did not contain any materials concerning station activities subsequent to 1988, including the station's 1990 renewal application; that the tower needed painting; that the station had no operating logs; that the station had not properly maintained its Emergency Broadcast System equipment or assured that such equipment was functioning; and that the station may have operated with excessive power during nighttime hours.

5. By letter dated September 9, 1992, the Commission endeavored to ascertain the identity of the persons operating the station in order to determine whether an unauthorized transfer of control had occurred in violation of Section 310(d) of the Communications Act of 1934, as amended,[3] and/or Sections 73.3540 and 73.3541 of the Commission's Rules.[4] In addition, the Commission's letter sought information concerning the station's operating power (Section 73.1745(a) of the Commission's Rules), and its compliance with rules governing tower painting, (Sections 17.21 through 17.23 of the Commission's Rules), the Emergency Broadcast System (Section 73.932 of the Commission's Rules), station logs (Section 73.1800 and 73.1820 of the Commission's Rules), and the public inspection file (Section 73.3526 of the Commission's Rules). The Commission's letter requested a response within 30 days. Although a return receipt indicated that the Commission's letter was received on September 16, 1992, Pine Tree did not respond.

6. By letter dated September 23, 1992, the Commission notified Pine Tree that its renewal application for Station KARW was incomplete. The Commission's letter requested a response to Question 7 of the application to demonstrate that the station would pose no significant environmental

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[1] Also before the Commission are staff letters of inquiry to the station dated September 9, 1992, September 23, 1992, December 3, 1992, and February 10, 1993, and an undated and unsigned letter purportedly from the station, which was received on January 26, 1993.

[2] Tuck never filed an ownership report (FCC Form 323) with the Commission to confirm consummation of the transfer of control.

[3] Section 310(d) of the Communications Act provides:

No ... station license, or any rights thereunder shall be transferred, assigned, or disposed of in any manner, volutarily or involuntarily ... except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

[4] Section 73.3540 of the Commission's Rules provides:

(a) Prior consent of the FCC must be obtained for a voluntary assignment or transfer of control.

Section 73.3541 of the Commission's Rules provides:

(a) The FCC shall be notified in writing promptly of the death ... of ... a person directly or indirectly in control of a corporation which is a ... licensee.

(b) Within 30 days after the occurrence of such death ... an application on FCC Form 316 shall be filed requesting consent ... for involuntary transfer of control of such corporation to a person or entity legally qualified to succeed to the foregoing interests under the laws of the place having jurisdiction over the estate involved.

impact from RF radiation to the public and to the station's workers. Also, the Commission's letter informed Pine Tree that the application was not properly certified in that it had not been signed by a corporate officer. The Commission's letter requested that Pine Tree submit its response by October 16, 1992. No response was received.

7. By letter dated December 3, 1992, the Commission informed Pine Tree that the Commission had not received a response to its September 9, 1992, letter. Thus, Pine Tree was requested to answer the September 9, 1992, letter, and was cautioned that failure to respond to official communications from the Commission could result in the imposition of administrative sanctions.

8. On January 26, 1993, the Commission received a written response from the station. The response attempted to answer some but not all of the questions posed in the Commission's September 9, 1992, letter. Among other things, the response indicated that Ferrell and Murray no longer managed the station. However, the response did not identify who does control the station or how they came to acquire such control. In addition, the response was not signed.

9. Because the station's submission was unsigned and not fully responsive, the Commission, by letter dated February 10, 1993, sought additional information from the station as well as a clarification of some of the information provided. In addition, this letter informed Pine Tree that it had failed to provide the information requested in the Commission's September 23, 1992, letter, concerning the station's 1990 renewal application. The February 10, 1993, letter enclosed copies of the September 9, September 23, and December 3, 1992, letters. Pine Tree was requested to provide a response within 15 days. Although the return receipt shows receipt of the letter on March 1, 1993, the station has never filed a response.

Discussion

10. Misrepresentation involves a false statement of fact. The seriousness of the offense depends on the facts and circumstances of the particular case. Crucial to a finding of misrepresentation is the existence of an intent to deceive. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Here, the renewal application submitted for Station KARW contains an apparent misrepresentation in that it was filed on behalf of Ken Tuck, who had died some three months earlier. Nowhere does the application reveal Tuck's death. Moreover, there is no evidence that the Murray who signed the application, had any legal authority to do so. Accordingly, an issue must be specified to determine whether the renewal application misrepresented the identity of the renewal applicant.

11. Section 73.1015 prescribes *inter alia*, that an applicant or licensee, when required by the Commission, must submit "written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked ...." Here, despite repeated attempts by the Commission to obtain information, the persons now operating Station KARW have refused to identify who is actually in control of the station and have refused to describe how such control was obtained. Moreover, it appears that one or more unauthorized transfers of control of Pine Tree have occurred. Pine Tree's owner of record, Kenneth Tuck, is deceased, and the Commission has not received any application to transfer control of Pine Tree to anyone else or to assign the station's license. Accordingly, appropriate issues will be specified.

12. As a final matter, the station has not demonstrated that the apparent technical violations have been corrected. Accordingly, we will specify an appropriate issue.

13. Accordingly, IT IS ORDERED, that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the captioned application of Pine Tree Media, Inc. for renewal of license of Station KARW IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether one or more unauthorized transfers of control of Pine Tree Media, Inc. occurred in violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 and/or Section 73.3541 of the Commission's Rules.

2. To determine whether Pine Tree Media, Inc. and/or persons acting on its behalf misrepresented facts in the station's 1990 renewal application.

3. To determine whether Pine Tree Media, Inc. and/or persons acting on its behalf violated Section 73.1015 of the Commission's Rules by failing to respond fully to Commission correspondence dated September 9, 1992, September 23, 1992, December 3, 1992, and/or February 10, 1993.

4. To determine whether Station KARW is in compliance with the following Commission rules: Section 1.1307(b) (environmental assessment); Sections 17.21 through 17.23 (tower painting); Section 73.932 (emergency broadcast equipment); 73.1745(a) (transmitter power); Sections 73.1800 and 73.1820 (station logs); and 73.3526 (public file).

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the application of Pine Tree Media, Inc. for renewal of license of Station KARW should be granted.

14. IT IS FURTHER ORDERED, that, if the hearing record does not warrant an Order denying the renewal application for Station KARW, it shall also be determined if Pine Tree Media, Inc., its successors or assigns, and/or those persons now in control of Pine Tree Media, Inc., American Plastics, and/or H. E. Ferrell and Robert Dub Murray, have willfully or repeatedly violated Section 310 of the Communications Act of 1934, as amended, and/or Sections 1.1307, 17.21 through 17.23, 73.932, 73.1015, 73.1800 and 73.1820, 73.3526, and/or 73.3540 and 73.3541 of the Commission's Rules. If so, it shall also be determined whether Orders for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, in an amount up to $250,000 for the willful or repeated violations of Section 310 of the Communications Act of 1934, as amended, and/or Sections 1.1307, 17.21 through 17.23, 73.932, 73.1015, 73.1800 and 73.1820, 73.3526, and/or 73.3540 and 73.3541 of the Commission's Rules, which occurred or continued within the applicable statute of limitations.

15. IT IS FURTHER ORDERED, that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended.

16. IT IS FURTHER ORDERED, that, in accordance with Section 309(e) of the Communications Act of 1934, as amended, the burdens of proceeding and proof with respect to all issues shall be upon Pine Tree Media, Inc., its successors or assigns and/or those persons now in control of Pine Tree Media, Inc., as appropriate.

17. IT IS FURTHER ORDERED, that American Plastics, H. E. Ferrell and Robert Dub Murray ARE MADE PARTIES TO THIS PROCEEDING.

18. IT IS FURTHER ORDERED, that, to avail themselves of the opportunity to be heard, Pine Tree Media, Inc., its successors and assigns, American Plastics, H. E. Ferrell and Robert D. Murray shall, pursuant to Sections 1.221(c) and 1.221(e) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, that Pine Tree Media, Inc., its successors and assigns and/or those persons now in control of Station KARW shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

20. IT IS FURTHER ORDERED, that the Secretary of the Commission send a copy of this Hearing Designation Order by *Certified Mail - Return Receipt Requested* to Pine Tree Media, Inc., American Plastics, H. E. Ferrell and Robert Dub Murray.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-129

In the Matter of

800 Data Base Access Tariffs and the

800 Service Management System Tariff

ORDER

Adopted: October 18, 1993; Released: October 18, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 19, 1993 the Bureau released an Order,[1] designating issues in our investigation of the 800 data base access tariffs. That order set deadlines by which oppositions to the local exchange carriers' (LECs) direct cases had to be filed. On August 5, 1993, the Tariff Division released an order which extended the time for filing pleadings responding to the LECs' direct cases to October 20, 1993 and the time for rebuttals until November 1, 1993. On October 14, 1993, the Ad Hoc Telecommunications Users Committee and National Data Corporation (petitioners) filed a motion to extend time to file their pleadings responding to the LEC direct cases, requesting that the deadline for filing direct cases be extended until 30 days after the Commission rules on several LEC petitions for waiver of the cost disclosure requirements of paragraph 29 of the *Designation Order*.[2]

2. Petitioners contend that, until the Commission rules on the pending petitions for waiver, petitioners will not know which cost support they should comment on, the information currently disclosed or the information which would be disclosed if the LECs' pending petitions for waiver are denied.

3. The Division has reviewed petitioners' request for extension of time and has determined that good cause has been shown to grant an extension to all parties. We are concerned however, with the open-ended nature of the request. We intend to rule on the waiver petitions expeditiously. Therefore, pleadings responding to the direct cases will now be due on November 30, 1993. Rebuttals to oppositions or comments will be due on December 10, 1993.

4. Accordingly, IT IS ORDERED that the petition for extension of time filed by Ad Hoc Telecommunications Users Committee and National Data Corporation IS GRANTED, to extend the deadlines for all parties in this proceeding to file pleadings responding to direct cases, and replies, as specified in paragraph 3 of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] *800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order Designating Issues for Investigation*, CC Docket 93-129, 8 FCC Rcd 5132 (1993) (*Designation Order*).

[2] *See also*, Public Notice, Participating Bell Operating Companies, US West and GTE Request Waivers of Requirement to Disclose Cost Support, CC Docket 93-129, DA 93-1164 (September 27, 1993) (established pleading cycle for comments on LEC petitions for waiver of of cost disclosure requirements in this proceeding).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PATTESON BROTHERS, INC. Assignor — File Nos. BAL-921118EE, BALH-921118EF

and

DUKE RADIO BROADCASTING, INC. Assignee

For Assignment of License
of KBTM(AM)/KJBR-FM
Jonesboro, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: October 13, 1993; Released: October 25, 1993

By the Commission: Commissioner Barrett issuing a separate statement.

1. The Commission has before it for consideration the above-captioned application for consent to assign the licenses of KBTM(AM)/KJBR-FM, Jonesboro, Arkansas, from Patteson Brothers, Inc. ("Patteson"), to Duke Radio Broadcasting, Inc. ("Duke"). This application is uncontested.

2. The sole shareholder of Duke is also the sole shareholder of the licensee of KFIN(FM), Jonesboro, Arkansas. The principal community contour of KJBR(FM) encompasses the principal community contours of both KFIN(FM) and KBTM(AM). Consequently, Duke submitted the exhibit required by the radio ownership rules. *See Revision of Radio Rules and Policies,* 7 FCC Rcd 2755 (1992)(*"Report and Order"*); *recon. granted in part, denied in part,* 7 FCC Rcd 6387 (1992)(*"Memorandum Opinion and Order"*). Duke's exhibit demonstrates that there are more than 15 commercial radio stations in the relevant market and that the combined audience share of the stations that Duke proposes to co-own is 34.19 percent. Because the combined audience share exceeds 25 percent, grant of the application is *prima facie* inconsistent with the public interest as the proposed transaction will lead to excessive local concentration. *See* 47 C.F.R. § 73.3555(a)(1)(ii); *Memorandum Opinion and Order,* 7 FCC Rcd at 6393, 6397. Nevertheless, Duke contends that the assignment transaction is consistent with the policy underlying the local ownership rules, and should thus be approved. Duke also makes an alternative request for either a permanent waiver of the local ownership rules or a temporary twelve month waiver in the event that we determine that this transaction is prohibited by the rules.

3. In MM Docket No. 91-140, the Commission relaxed the local and national radio ownership restrictions. *See Report and Order,* 7 FCC Rcd 2755 (1992), *Memorandum Opinion and Order,* 7 FCC Rcd 6387. The local ownership rules are based on market size and audience share. Specifically, in markets with fewer than 15 commercial stations, the common ownership of up to three stations is permissible, provided that no more than two of the stations are in the same service and that the commonly owned stations represent less than 50 percent of the total number of stations in the market. *See* 47 C.F.R. § 73.3555(a)(1)(i). In markets with 15 or more commercial stations, common ownership of up to two AM and two FM stations is permitted, provided that no excessive concentration results from the combination. *See Memorandum Opinion and Order,* 7 FCC Rcd at 6393. On reconsideration, we modified our approach to determining the number of stations in a market, and concluded that the relevant market would be based on the principal community contours of the stations in question.[1] Thus, the number of stations in a market is determined by counting all commercial stations whose principal community contours overlap, in whole or in part, the principal community contours of the commonly-owned, mutually overlapping stations.[2] *See* 47 C.F.R. § 73.3555(a)(3)(ii); *Memorandum Opinion and Order,* 7 FCC Rcd at 6395.

4. Duke first argues that the proposed combination should be evaluated by the standards for markets with fewer than 15 stations. Specifically, Duke argues that the relevant market should include only stations that provide "listenable" signals to Jonesboro. Duke identifies 11 stations that provide a "listenable" signal to Jonesboro. Thus, Duke contends that the proposed combination is permissible under the local ownership rules, since there are fewer than 15 stations in the market and the proposed combination includes no more than two stations in the same service and constitutes less than 50 percent of the number of stations in the market. However, Duke concedes that the principal community contours of more than 15 stations intersect the area encompassed by the principal community contours of the stations at issue here, the outer limit of which is the KJBR-FM principal community contour. Nevertheless, Duke argues that other than the 11 stations it identifies, none of the other stations included in the market as it is defined in the rules serve Jonesboro and that some of these stations are actually Memphis stations.

5. We find no basis on which to evaluate this transaction using Duke's method for defining the relevant market. Duke claims that this location-specific market definition is justified by the geographic isolation of the Jonesboro area. However, when the local ownership rules were revised, we rejected the use of geographic designations, such as Metro-

[1] The local ownership rules originally defined the relevant market by the contour overlap standard only when the stations at issue were located outside of designated Arbitron radio metro markets. *See Report and Order,* 7 FCC Rcd at 2778-79.

[2] Included in the relevant market are all operating commercial full-power stations, including daytimers and foreign stations, but excluding non-commercial stations, translators or non-operational stations, that is, stations for which construction permits have been authorized but are not on the air, or stations that have been silent for more than six months. *See* 7 FCC Rcd at 6395.

politan Statistical Areas (MSAs) and the county in which the station is located, to determine the relevant market. *See Memorandum Opinion and Order,* 7 FCC Rcd at 6395. The exhibit accompanying Duke's application identifies 37 stations in the relevant market based on the contour overlap standard as adopted. Although Duke contends that only 11 of these stations provide a "listenable" signal to Jonesboro, Duke does not define the criteria used to determine that there are 11 "listenable" signals. Review of Duke's multiple ownership exhibit reveals that the 11 stations with "listenable" signals have principal community contours which are totally encompassed by the principal community contour of KJBR(FM). There are a number of other stations whose principal community contours are also wholly encompassed within the principal community contour of KJBR(FM), and Duke offers no explanation as to why these stations do not provide the requisite "listenable" signal to Jonesboro.

6. Moreover, we have already explicitly rejected the use of the area within a station's principal community contour to define the relevant market. *See Memoradum Opinion and Order,* 7 FCC Rcd at 6395. Additionally, to the extent that Duke suggests that the market should be determined by using a test based on the available signals in Jonesboro, the Commission has declined to use such a narrow definition. In this regard, we determined that the contour overlap standard addresses our core concerns of diversity and competition while reflecting the actual options available to listeners and market conditions facing the particular stations in question. *See Memorandum Opinion and Order,* 7 FCC Rcd at 6395. We have previously concluded that this standard for market definition is likely to be conservative because listeners in rural areas where there are few operating stations, and thus low levels of daytime interference, may be able to receive signals beyond the predicted principal community contour. *See Report and Order,* 7 FCC Rcd at 2779. Duke offers no evidence sufficient to demonstrate that our conclusion in this regard is inaccurate or otherwise unjustified. In any event, Duke's proposal is, in essence, a request to reconsider the radio ownership rulemaking proceeding. In this connection, we note that KFIN Radio filed comments on reconsideration of the radio ownership rules in the *Report and Order* and that Larry A. Duke also has pending late-filed letter comments requesting further reconsideration of the *Memorandum Opinion and Order.*[3] Nevertheless, we find no basis in this application proceeding on which to use the market definition proposed by Duke. Consequently, the relevant market will be determined by the contour overlap standard set forth in the rules.

7. Jonesboro is not within an Arbitron metro market. Duke thus calculated the 34.19 percent combined audience share using 1992 Arbitron county data, weighted by population, for the counties covered in whole or in part by the principal community contours of the stations at issue. *See* 47 C.F.R. § 73.3555(a)(3)(iii). *See also, Memorandum Opinion and Order,* 7 FCC Rcd at 6398, n.73. However, Duke asserts that the 34.19 percent combined audience share based upon 1992 county data is an aberration. Therefore, Duke has submitted the weighted combined audience share figures for the stations at issue for the past six years. Duke states that the average combined audience share for this six year period is 23.4 percent, which is sufficient to demonstrate that no excessive concentration will result if the proposed combination is approved.

8. When we reconsidered the local ownership rules we emphasized that audience share is best measured with widely-used audience survey data such as Arbitron because such data are probative and accessible measures of market power. *Memorandum Opinion and Order,* 7 FCC Rcd at 6397. Therefore, we stated that if audience share data for the market are readily available from Arbitron or a similarly published ratings service, applicants will be required to provide that audience share data. However, we acknowledged that there may be situations where applicants can provide data that eliminates statistical anomalies in audience share survey data. Therefore, we also provided for the submission of alternative showings in appropriate cases, *e.g.,* to correct statistical anomalies in the generally available audience survey data, provide a better focused survey area or provide other data which proves that excessive concentration will not exist. *Memorandum Opinion and Order,* 7 FCC Rcd at 6399; Note following 47 C.F.R. § 73.3555(a)(1)(ii). While we afford applicants the flexibility of providing an alternative showing, each applicant bears the burden of proving compliance with the 25 percent audience share limit. *Id.* at 6400.

9. Duke argues that the 34.19 percent combined audience share, standing alone, does not reflect the long-term listening patterns in the relevant market because the 34.19 percent share constitutes an "isolated data disparity caused by Arbitron sampling techniques." In this regard, we find that a presumption of excessive concentration cannot be overcome by trend data that demonstrates an average combined audience share of less than 25 percent unless it is first shown how that trend data overcomes a statistical anomaly in the current ratings provided by Arbitron. *See Memorandum Opinion and Order,* 7 FCC Rcd at 6399. However, arguments relating to inaccuracies stemming from Arbitron's general survey techniques are unpersuasive in absence of a showing that the purported flaws adversely affected the particular ratings survey period in question more than other survey periods conducted at other times or places under similar statistical conditions. Duke's assertions are supported only by the bare six year average combined audience share for the stations in question without discussion of the nature of the disparity or the defects in the most recent surveys or their sampling procedure. Consequently, Duke has not demonstrated why the average trend data is more accurate. *See Memorandum Opinion and Order,* 7 FCC Rcd at 6398 n.71, 6399. Without more, we cannot conclude that the combined audience share based on 1992 data is anomalous, especially since Duke's showing indicates that weighted combined audience share of the proposed combination based on 1991 Arbitron county data also exceeded 25 percent. Therefore, we find that Duke has failed to meet its burden of providing sufficient evidence to show compliance with the 25% audience share limit.

[3] Moreover, we note that on August 23, 1993, the National Association of Broadcasters filed a petition for rulemaking which proposes, among other things, to modify in certain circumstances the contour overlap standard of market definition.

10. Because the combined audience share of the stations at issue exceeds 25 percent, and since Duke fails to overcome the *prima facie* concern that the proposed combination will result in excessive concentration. Duke's acquisition of KBTM(AM)/KJBR-FM is prohibited by the local ownership rules. Duke makes alternative requests for either a temporary or a permanent waiver. We have not previously considered a request for a waiver of the revised radio ownership rules. However, in the past, the Commission has considered a waiver of its multiple ownership rules if an applicant can sustain the burden of demonstrating that the benefits to be achieved by its proposal outweigh any detrimental effect on the policies underlying the rule to be waived. *See generally, Silver King Broadcasting of Vineland, Inc.*, 2 FCC Rcd 324 (1986), *recon. denied, Press Broadcasting Co.*, 3 FCC Rcd 6640 (1988), *aff'd sub nom. office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990). In this regard, Duke has the burden of pleading with particularity the specific facts and circumstances which support the requested waiver. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (1969) (subsequent history omitted), *citing Rio Grande Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968)(*per curiam*).

11. In support of its request for a permanent waiver, Duke claims that grant of the requested waiver will advance the policy behind the new ownership rules by allowing Duke, as the owner of a financially sound station, to acquire KBTM(AM)/KJBR-FM, stations which have been experiencing financial difficulties. Duke has also submitted 28 letters in support of the proposed combination from community leaders. Duke further contends that grant of this application will allow Duke to combine KFIN(FM)'s demonstrated commitment to community service with the advanced technical facilities of KBTM(AM)/KJBR-FM to improve service to the public.

12. The local ownership rules have been significantly relaxed in order to promote the viability of the radio industry, and thus the industry's ability to serve the public interest. Consequently, the new ownership rules are intended to ameliorate financial and economic pressures on the radio industry by allowing licensees to adapt to changing market conditions and to take advantage of the efficiencies of common ownership. *See Report and Order*, 7 FCC Rcd at 2773-76. However, the revisions to the ownership rules represent a careful balance between permitting consolidation to allow broadcasters to take advantage of the benefits of group ownership and preserving competition and diversity. *See Report and Order*, 7 FCC Rcd at 2757, 2760-61, 2773-76; *Memorandum Opinion and Order*, 7 FCC Rcd at 6387-88. Accordingly, we adopted the numerical station limits and the 25 percent audience share benchmark as safeguards to insure that consolidation will not ultimately undermine competition and diversity. *See Memorandum Opinion and Order*, 7 FCC Rcd at 6393.

13. Although Duke asserts that a waiver is consistent with the local ownership rule's policy of allowing the licensee of a financially secure station to acquire a station that is struggling financially, Duke offers no documentation concerning KJBR-FM's financial condition. Duke's exhibit shows that KJBR-FM's most recent audience share ratings exceed that of KFIN(FM) in two of the ten counties in the relevant market and that KJBR-FM is one of the top three or four stations in seven of the ten counties. We have recognized that audience share is linked to revenue from advertising, but Duke has not offered any explanation to justify its statement about KJBR-FM's finances in light of KJBR-FM's market share. *See Report and Order*, 7 FCC Rcd at 2782. Duke's waiver showing does not address the market power that it will achieve as a result of a waiver of the local ownership rules, and the letters in support of the proposed combination primarily address Duke's existing stewardship at KFIN(FM) and the community service performed by the station and the licensee.[4] Furthermore, although some of the letters of support and the assignment application indicate that the stations will be independently programmed to serve different demographic groups, we find that such statements are insufficient to overcome the *prima facie* concerns that the combination will lead to excessive concentration. The new local ownership rules address the issues of diversity and competition by preventing an entity or individual from acquiring a disproportionate share of the local market, regardless of program format.

14. Thus, Duke has not demonstrated that its proposed ownership of the three stations with a combined audience share of over 30 percent will not have an adverse effect on diversity and competition in the relevant market. Under these circumstances, we find that Duke has failed to sustain its burden of demonstrating that the requested waiver is in the public interest. *See Rio Grande Radio Fellowship, Inc. v. FCC*, 406 F.2d at 666. Therefore, Duke's request for a permanent waiver of the local ownership rules will be denied.

15. However, Duke has also requested a temporary twelve month waiver in order to complete an orderly divestiture of one of the two FM stations it would control after this transaction is completed. Duke claims that a temporary waiver is consistent with Commission precedent, and is particularly appropriate in light of the parties' good faith in undertaking a transaction believed to be consistent with the Commission's rules.[5] Duke amended its application on July 29, 1993 and August 16, 1993 to supplement its request for a temporary waiver. Specifically, during the temporary waiver period, Duke proposes to completely divest itself of one of the two FM stations.

16. We are persuaded that a temporary waiver of the local ownership rules for a one year period is justified on the record now before us. As Duke correctly points out, the Commission has in the past waived provisions of the local ownership rules on a temporary basis to allow a proposed assignee to come into compliance with the rules by divesting its interest in one or more of its radio licenses. *See, e.g., WAPA*, 6 FCC Rcd 78 (1990). In this connection, we note that the stations will continue to operate independently during the waiver period. Thus, the stations will have autonomous staff and management and will be separately programmed. KFIN(FM) and KBTM(AM)/KJBR-FM will each have their own independent local sales, operating and front office personnel. Independent programming, as discussed above, is insufficient to support a permanent waiver of the local ownership rules here, in light of the combined audience share exceeding 30 percent. However,

[4] We note that several of the letters in support state that KFIN(FM) already dominates the relevant market in terms of advertising revenues and listenership.

[5] Duke does not offer further explanation or provide a basis for its alleged "good faith" belief that this transaction would comply with the local ownership rules.

given that the market relevant to this transaction is well served by other mass media services, and given that the stations will be operated as separate facilities, we do not believe that a limited waiver to allow Duke to make arrangements to sell one of the FM stations will unduly compromise the fundamental policies served by the local ownership rules. Accordingly, we will grant a one year waiver to allow Duke to file an application for Commission consent to assign the license of either KJBR-FM or KFIN(FM). However, we emphasize that no further waiver requests will be considered in this matter.

17. In view of the foregoing, IT IS ORDERED That the request of Duke Radio Broadcasting, Inc. for a permanent waiver of 47 C.F.R. § 73.3555 IS HEREBY DENIED. IT IS FURTHER ORDERED That the alternative request for a temporary twelve month waiver of 47 C.F.R. § 73.3555 IS HEREBY GRANTED to the extent set forth herein and IS DENIED in all other respects. Because Duke is otherwise fully qualified and the public interest would be served thereby, the application for consent to assign the licenses of KBTM(AM)/ KJBR-FM, Jonesboro, Arkansas, from Patteson Brothers, Inc. to Duke Radio Broadcasting, Inc., File Nos. BAL-921118EE, BALH-921118EF, IS GRANTED, subject to the condition that within one year from the adopted date of this decision that Duke Radio Broadcasting, Inc. has filed an application for Commission consent to assign the license of either KFIN(FM) or KJBR-FM to a new party.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

In re: Application of Patteson Brothers, Inc. and Duke Radio Broadcasting, Inc. for Assignement of License of KBTM(AM)/KJBR-FM, Jonesboro, Arkansas (Memorandum Opinion and Order)

I support the grant of a limited waiver to Duke Radio Broadcasting, Inc. ("Duke") for a one (1) year period which will allow Duke to divest its interests in one of the two (2) FM stations. However, I am concerned about the potential impact of the audience share combination of 34.19 percent that results in this instance. This clearly exceeds the permissible combined audience share of 25 percent which the Commission has deemed consistent with the public interest under our rules.

Therefore, in this context, the Commission should not only refuse to entertain any request for extension of the waiver, but should insist that Duke's failure to divest its interests in either station within one (1) year's time constitutes sufficient cause to subject the station to distress sale.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

In re:

Complaint of Rural California Broadcasting Corporation against Century Cable	CSR-3880-M CA0021

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: October 12, 1993; Released: October 25, 1993

By the Chief, Mass Media Bureau:

1. On July 2, 1993, a petition on behalf of Rural California Broadcasting Corporation, licensee of Station KRCB-TV (Educ., Ch. 22), Cotati, California, was filed with the Commission claiming that Century Cable ("Century"), operator of a cable television system serving San Pablo, California, had declined to carry the station, even though Cotati is within fifty miles of the system's principal headend located near San Pablo at latitude $37^{0}55'41"$ longitude $122^{0}17'26"$, and the station is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KRCB-TV requests that the Commission not only order Century to carry its signal, but also order that the system carry it on channel 22, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KRCB-TV's petition establishes that it is entitled to carriage on the San Pablo cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 2, 1993, by Rural California Broadcasting Corporation IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Century Cable IS ORDERED to commence carriage of KRCB-TV on cable channel 22 forty-six (46) days from the release date of this Order. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission,* Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Rural California Broadcasting Corporation against Americable International	CSR-3878-M CA1293

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: October 12, 1993; Released: October 25, 1993

By the Chief, Mass Media Bureau:

1. On July 2, 1993, a petition on behalf of Rural California Broadcasting Corporation, licensee of Station KRCB-TV (Educ., Ch. 22), Cotati, California, was filed with the Commission claiming that Americable International ("Americable"), operator of a cable television system serving Mare Island, California, had declined to carry the station, even though Cotati is within fifty miles of the system's principal headend at Mare Island and this station is, therefore, a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KRCB-TV requests that the Commission not only order Americable to carry its signal, but also order that the system carry it on channel 22, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KRCB-TV's petition establishes that it is entitled to carriage on the Mare Island cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 2, 1993, by Rural California Broadcasting Corporation IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Americable International IS ORDERED to commence carriage of KRCB-TV on cable channel 22 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission,* Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Roy J. Stewart
Chief, Mass Media Bureau

In re:

Complaint of Central Missouri	CSR-3915-M
State University against	MO0843
Douglas Cable Communications	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: October 12, 1993; Released: October 25, 1993

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Deepwater, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the systems's principal headend at north latitude $93^{0}46'22"$ and west longitude $38^{0}15'38"$, and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Deepwater cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri	CSR-3911-M
State University against	MO0599
Douglas Cable Communications	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: October 12, 1993; Released: October 25, 1993

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Waverly, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the systems's principal headend at north latitude $93^{0}31'03"$ and west longitude $39^{0}12'34"$, and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Waverly cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

TELSO, INC.,
Complainant,

v. File No. E-93-098

BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendant.

ORDER

Adopted: October 19, 1993; Released: October 26, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On August 19, 1993, Telso, Inc. (Telso) filed the above-captioned formal complaint against Bellsouth Telecommunications, Inc. (Bellsouth). Telso alleged in its complaint that Bellsouth had engaged in unjust and unreasonable practices with respect to charges for fraudulent calls placed from or to its privately owned payphones.

2. The parties filed a joint motion to dismiss on October 13, 1993. In support of their motion, the parties stated that they had resolved all issues in dispute and requested that the proceeding be dismissed without prejudice.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the Commission and the parties.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed on October 13, 1993 IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

David A. Cadden NAL/Acct. 215FE0014
Bainbridge Island, Washington

ORDER

Adopted: October 14, 1993; Released: October 26, 1993

By the Chief, Field Operations Bureau:

1. The Bureau has before it a Petition for Reconsideration filed by David A. Cadden, (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's July 27, 1992, Forfeiture Order finding Petitioner liable for a monetary forfeiture in the amount of $2,000 for willful violation of Section 301 of the Communications Act, 47 U.S.C. § 301. Petitioner requests reconsideration. As explained below, we are cancelling the monetary forfeiture penalty.

2. On May 27, 1992, the Ferndale Office issued a Notice of Apparent Liability (NAL) for violating Section 301 of the Communications Act, 47 U.S.C. Section 301, for operating an unlicensed radio station on Marine Channel 16. Mr. Cadden did not respond to the Notice of Apparent Liability and the Ferndale Field Office issued a Notice of Forfeiture for $2,000 on July 27, 1992. Mr. Cadden responded to the Notice of Forfeiture by letter dated August 3, 1992.

3. Mr. Cadden feels that he should not be liable for the $2,000 fine because he was at home at the time the transmission was made. He stated that he had a buyer on his vessel at that time. He did do not know whether the buyer used the radio. There is insufficient evidence in the file to establish Mr. Cadden's responsibility for the unlicensed operation.

4. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that the proposed monetary forfeiture to David A. Cadden IS CANCELLED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY — File No. S-C-L-93-003

Application for a license to Land and Operate a High Capacity Digital Submarine Cable System wholly within the State of Hawaii, linking the islands of Kauai, Oahu, Maui and Hawaii

CABLE LANDING LICENSE

Adopted: October 19, 1993; Released: October 26, 1993

By the Acting Chief, Common Carrier Bureau:

1. GTE Hawaiian Telephone Company (HTC or Applicant) has applied for a license pursuant to the provisions of an "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39. HTC seeks authority to land and operate a high capacity digital submarine cable system, known as the HTC Interisland Cable, between and among islands in the State of Hawaii. The application was placed on public notice on November 25, 1992. No comments were received in response to the application.

2. The HTC Interisland Cable will be located wholly within the State of Hawaii, linking the islands of Kauai, Oahu, Maui and Hawaii. The HTC Interisland Cable will be a high capacity, fiber optic, lightguide submarine cable system with a design capacity equivalent to 24,192 digital channels of 64 kilobits per second each. The HTC Interisland Cable will be repeaterless.

3. The HTC Interisland Cable will be used to provide HTC's authorized communication services between the four most populated islands in the State of Hawaii. Traffic between the islands is currently being carried on microwave radio systems which HTC states are reaching their capacity and cannot meet projected customer demand. Upon completion of the HTC Interisland Cable, HTC states that existing traffic will be transferred to the fiber optic cable system from the existing microwave system, which will be retained for route diversity and back-up. According to the Applicant, there has been a dramatic increase in telephone subscribers in the State of Hawaii. In addition, anticipated near-term demand for high bandwidth video and data communication service to Maui and Hawaii cannot effectively be met with the existing microwave spectrum allocated by the Commission, using present or anticipated technology. The applicant states that the HTC Interisland Cable will enable it to respond to increased demand and will increase service reliability by adding a diverse route via a digital facility. HTC further notes that service reliability will be increased because fiber optic systems are inherently immune to adverse atmospheric conditions which may interfere with present interisland radio communications.

4. By letter dated October 5, 1993, the State Department informed the Commission that it has no objection to the application to land and operate the HTC Interisland Cable system.[1] Upon consideration of the factors set forth in the subject application and in view of the State Department's October 5, 1993 letter, we find that a grant of a cable landing license for the HTC Interisland Cable will serve the public interest.

5. Based on the information provided by the Applicant, we conclude that a grant of the requested authorization will not have a significant effect on the environment as defined by Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976). Consequently, HTC is not required to submit an environmental assessment with the subject application under Section 1.311 of the Commission's Rules.

6. In light of the above considerations, the Commission hereby GRANTS AND ISSUES, under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§ 34-39, and pursuant to the authority delegated to this Commission under Executive Order 10530, dated May 10, 1954, 3 C.F.R. 1954-1958, Comp., p. 189 (1961), reprinted in 3 U.S.C.A. § 301 at p. 1052 (1985), to the Applicant herein a license to land and operate a high-capacity fiber optic digital submarine cable having the capacity specified in paragraph 2, supra, between the Islands of Hawaii, Maui, Oahu and Kauai. This license is subject to "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§ 34-39; the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-609; subsequent applicable acts; all relevant rules and regulations of the Federal Communications Commission; any treaties or conventions relating to communications to which the United States of America is or may hereafter become a party; any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying or amending any rights accruing to any person hereunder; and the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public

[1] The State Department's letter stated that the correspondence to the Commission had been coordinated with the National Telecommunications and Information Administration and with the Defense Information Systems Agency.

interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensee or any persons or companies controlling it or controlled by it does not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons or companies controlling it or controlled by it are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§ 34-39, or for failure to comply with the terms of the authorization;

(6) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

7. IT IS FURTHER ORDERED THAT any use of the HTC Interisland Cable for international communications will require a new Section 214 application.

8. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT EARTH STATIONS, INC., ASSIGNOR — File Nos.: CSG-93-112-AL, ITC-93-197-AL

and

KOROR SATELLITE EARTH STATION CORPORATION, ASSIGNEE

Applications for Consent to Assignment of A Title III Earth Station Facility and Section 214 Authorizations

MEMORANDUM OPINION AND ORDER

Adopted: October 20, 1993; Released: October 26, 1993

By the Acting Chief, Common Carrier Bureau:

1. We have under consideration the above-captioned applications filed by COMSAT Earth Stations, Inc. (Comsat) and Koror Satellite Earth Station Corporation (KSES).[1] Comsat requests authority to assign to KSES its Title III authorization for satellite earth station KA-35 at Koror, Republic of Palau, pursuant to Section 310 of the Communications Act of 1934 (the Act), as amended, 47 U.S.C. § 310. In addition, Comsat requests authority, pursuant to Section 214 of the Act, 47 U.S.C. § 214, to assign its Section 214 authorizations to provide services via this earth station facility. The above-captioned applications were filed on May 12, 1993. We placed the applications on public notice on May 19, 1993. No comment or opposition was received. For the reasons stated below, we will grant these applications.

2. Comsat is a U.S. corporation owned and operated by U.S. citizens. In January 1981, Comsat entered into an agreement with the Republic of Palau to construct, own and operate the subject earth station for the provision of satellite communications services. Under the terms of the agreement, the Government of Palau was obligated to lease from Comsat a minimum number of channels for the provision of voice, record, and television services. In the subject applications, Comsat now seeks FCC consent to the assignment of the earth station authorization for KA-35 to KSES. Comsat also seeks authority to assign its Section 214 authorizations to furnish channels of communications to the Government of Palau for the provision of point-to-point voice grade and wide-band television services and point-to-point high speed data services via this earth station.[2]

3. KSES is a U.S. corporation, whose officers and directors are U.S. citizens, but whose ultimate parent corporation, Palau National Communications Corporation (PNCC) is a Palauan corporation with mostly Palauan officers, directors, and shareholders.[3] Accordingly, Comsat and KSES seek a finding under Section 310 (b)(4) of the Act that the public interest would not be disserved by permitting KSES to be a Commission licensee.

4. The earth station in question is physically located in the Republic of Palau and provides telephone service and television reception to the inhabitants of Palau. Palau consists of a series of islands encompassing a total land area of 178 square miles, located 4,000 miles from Honolulu. It is the sole remaining component of the Trust Territory of the Pacific Islands created by the United Nations in 1947. As such, Palau is administered by the U.S. Department of Interior, which has responsibility for managing the economic, political and oversight obligations of the United States.[4] Moreover, the United States provides support for the operation, maintenance and supply of Palau's communications requirements.

5. Comsat and KSES assert that the proposed assignment of license and Section 214 authority is consistent with the public interest and is not barred by Section 310(b)(4) of the Act.[5] According to Comsat and KSES, the requested assignments are within the Commission's discretion under

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[1] Comsat also filed an application for authority to acquire SCPC equipment and operate 16 voice grade circuits between the Republic of Palau and various international points. File No. ITC 93-291. That application was automatically granted pursuant to the provisions of Section 63.03 of the Commission's Rules. 47 C.F.R. § 63.03.

[2] File No. I-P-C-81-019, Mimeo No. 002096, released July 10, 1981; File No. I-P-C-82-038, Mimeo No. 6071, released September 1, 1982; File Nos. I-P-C-83-035 and I-P-C-83-037, Mimeo No. 3131, released March 25, 1983.

[3] KSES is a wholly-owned subsidiary of Palau Satellite Communications Corporation (PSCC), a U.S. corporation, whose officers and directors are also U.S. citizens. However, PSCC is wholly-owned by the Palauan corporation, Palau National Communications Corporation, described above.

[4] In anticipation of the ultimate dismantling of the U.N. Trust Agreement and a concomitant conferral of sovereignty, the Department of Interior authorized the establishment of constitutional governments in the components of the U.N. Trust territory, including the "Republic of Palau." *See* U.S. Department of Interior, Order No. 3039 (April 25, 1979). The Republic of Palau is scheduled to hold a plebiscite on November 9, 1993 at which time it will vote on a Compact of Free Association.

[5] Section 310(b)(4) of the Act provides that:

(b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by

...

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310(b)(4).

Section 310(b)(4) permitting foreign ownership in excess of 25 percent, foreign officers, or more than 25 percent foreign directors where the public interest is not disserved.

6. Comsat and KSES point out that the purpose for which Section 310 of the Act was enacted was "to guard against *foreign* influence by curbing aliens' participation in certain *domestic* radio activities." KSES Comments at 5, *quoting General Electric Company*, DA 90-342, released March 8, 1990 (emphasis added). They further point out that there is nothing in the legislative history of Section 310 to suggest that Congress sought to disenfranchise people from being licensees in their own lands. Here, the earth station is located in Palau and is designed to provide high quality satellite communications services to Palauans. Under these unique circumstances, Comsat and KSES argue that the public interest would not be served by refusing to permit KSES to be a Commission licensee.

7. In view of the foregoing, we find that the public interest does not require the refusal to license KSES. We note that Palau enjoys a unique relationship with the United States in that its territory is administered by the U.S. Department of Interior. We further note that the facility in question is a passive one. Therefore, we will grant the assignment of the earth station license and the Section 214 authorizations.

8. Accordingly, IT IS ORDERED, that the application for consent to assignment of a Title III earth station facility from COMSAT Earth Stations, Inc. to Koror Satellite Earth Station Corporation, File No. CSG-93-112-AL, IS GRANTED and COMSAT Earth Stations, Inc. is authorized to assign to Koror Satellite Earth Station Corporation the Title III earth station license for KA-35.

9. IT IS FURTHER ORDERED that the application for consent to assignment of Section 214 authority filed by COMSAT Earth Stations, Inc. and Koror Satellite Earth Station Corporation, File No. ITC 93-197-AL, IS GRANTED and COMSAT Earth Stations, Inc. is authorized to assign to Koror Satellite Earth Station Corporation the Section 214 authorizations listed in note 2.

10. IT IS FURTHER ORDERED that Koror Satellite Earth Station Corporation shall maintain tariffs, pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for its authorized services.

11. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC.	File No. BPH-870706ML
GONZALES BROADCASTING, INC.	File No. BPH-870707MJ
BOLTON BROADCASTING LIMITED	File No. BPH-870710MD
VOTH BROADCASTING COMPANY	File No. BPH-870710MF
METROPOLITAN MANAGEMENT CORPORATION	File No. BPH-870710MY
LORENZO JELKS	File No. BPH-870710MZ
QRW PARTNERS LIMITED PARTNERSHIP	File No. BPH-870710NF
MABLETON COMMUNICATIONS, LIMITED	File No. BPH-870710NQ

For a Construction Permit for a New FM Station on Channel 273A (102.5 MHZ), Mableton, Georgia

Appearances

Joseph A. Belisle on behalf of Mableton Broadcasting Company, Inc.; *Dennis F. Begley, Matthew H. McCormick* and *Troy F. Tanner* on behalf of Gonzales Broadcasting, Inc.; *Steven Yelverton* and *John W. Hunter* on behalf of Bolton Broadcasting Limited; *Lind Carl Voth, pro se,* on behalf of Voth Broadcasting Company; *Margaret L. Tobey* and *Paula G. Friedman* on behalf of Metropolitan Management Corporation; *Lawrence J. Bernard* on behalf of Lorenzo Jelks; *Clarence E. Dilday* on behalf of QRW Partners Limited Partnership; *Ralph C. Crossley, pro se,* on behalf of Mableton Communications Limited; and *Norman Goldstein* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: October 14, 1993; Released: October 22, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

Board Member BLUMENTHAL:

1. The Board has before it: (1) the *Initial Decision,* 5 FCC Rcd 2474 (1990)(*I.D.*), and the *Supplemental Initial Decision,* 7 FCC Rcd 4431 (1992)(*S.I.D.*), both issued by Administrative Law Judge Walter C. Miller (ALJ); and (2) the exceptions and reply pleadings filed by the above-captioned parties and directed to the *I.D.* as well as the *S.I.D.*[1] It also has a number of associated motions and pleadings that will receive appropriate disposition hereinbelow.

BACKGROUND

2. Eighteen (18) applicants originally filed for this Georgia frequency, but only ten (10) remained by April 1990. *I.D.*, para. 1. After the initial hearing, the *I.D.* opined that Bolton Broadcasting Limited (BBL) was the comparatively superior applicant. Upon review of the many exceptions to the *I.D.*, the Board took two fundamental actions. *First,* we found fatal flaws in the ownership proposal of BBL's purported limited partnership, which determination the Board believed would effectively remove BBL from the competition for this channel. *Mableton Broadcasting Co., Inc.,* 5 FCC Rcd 6314 6314-17 (Rev. Bd. 1990)(*Remand Order*).[2] In view thereof, the Board found it unnecessary to remand BBL's application for supplemental hearing on several basic qualifying issues exposed on the record of the initial hearing.[3]

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[1] In this *Decision,* the remaining parties will be identified at most times as follows: Mableton Broadcasting Co., Inc. ("MBC"); Gonzales Broadcasting, Inc. ("Gonzales"); Bolton Broadcasting Limited ("BBL"); Voth Broadcasting Co. ("Voth"); Metropolitan Management Corp. ("MMC"); Lorenzo Jelks ("Jelks"); QRW Partners Limited Partnership ("QRW"); Mableton Communications Limited ("MCL"). In this *Decision* also, exceptions and replies to the *I.D.* will be identified as "Exceptions" and "Replies"; as to the *S.I.D.,* these will be designated "*S.I.D.* Exceptions" and "*S.I.D.* Replies."

[2] The Board notes that, in *Marlin Broadcasting of Central Florida, Inc. v. FCC,* 952 F.2d 507, 511 (D.C. Cir. 1992), the court specifically cited our 1990 *Remand Order* in this case for the proposition that the FCC must "identify and eliminate from participation those applicants who are not *bona fide*." However, we are certain that the *Marlin* court has not prejudged any appeal BBL might take from our *Remand Order,* and that BBL retains all of its future appellate rights. On the other hand, to the degree that the *S.I.D.* (at paras. 62-66) is inconsistent with the Board's *Remand Order* disposition of BBL, the ALJ's language is merely intemperate surplusage and will be disregarded.

[3] Our *Remand Order* expressed the view that "[b]ut for the fact that our denial of integration credit ... will likely preclude it from prevailing," our remand would have included "abuse of process and/or misrepresentation issues" against BBL. *See* 5 FCC Rcd at 6324 n.12. A further hearing would be necessary on

3. *Second,* we were foresquare in unison with those applicants whose exceptions to the *I.D.* echoed a singular theme, to wit: whereas "numerous petitions to enlarge issues were filed alleging various *basic, qualifying* defects in the parties' applications ... [e]ach of these pleadings was denied as an unjustifiable attempt to restructure the proceeding."[4] But, notwithstanding the ALJ's refusal to add basic qualifying issues as requested by the respective parties, the *I.D.* routinely derogated various of the applicants on such assorted basic issues as finances, transmitter sites and character, dealing with such issues ostensibly under the *comparative* factor of ownership/management integration. Consequently, the Board was compelled to remand this proceeding on basic qualifying issues against three of the applicants who appeared on this record to be potentially competitive on a *comparative* basis, should they be found basically qualified. *See Remand Order, passim.*[5]

4. The critical combined results of the *I.D.* and the *S.I.D.* were as follows: the ALJ (1) denied integration credit to MBC; (2) denied integration credit to Gonzales; (3) granted integration credit and recommended award of this construction permit to BBL; (4) dismissed Voth for failure to prosecute; (5) denied integration credit to MMC; (6) disqualified Jelks on financial and misrepresentation issues; (7) disqualified QRW on a financial and misrepresentation issues; and (8) disqualified MCL on a financial issue. Having treated sufficiently with BBL in our *Remand Order,* and upon review of this entire record and the parties' pleadings, we hold that Gonzales is the comparatively superior applicant under the yet-prevailing precepts of the *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965). Because we so hold, and believe therefore that many of the remaining exceptions are either without merit or non-decisional, we turn first to Gonzales and then address, to the extent decisional, the exceptions of the other six parties.

EXCEPTIONS

5. *GONZALES.* A husband/wife partnership, this applicant claimed an ownership structure of Sue Gonzales Polk (51% equity; proposed president) and Lawrence Polk (49% equity; proposed vice president). Although Mr. Polk, who owned and ran WYNX(AM), Smyrna, Georgia, from 1966-1985, and Ms. Polk, who started to work at WYNX in 1974 and was that station's vice-president (1978-1985) and sales manager (1983-1985), have lived in Mableton's proposed service area "continuously for more than 25 years" and here vowed to personally manage their new facility,[6] the ALJ denied them all comparative integration credit. Adding neither truthfulness issues nor finding intentional untruthfulness,[7] the ALJ nonetheless denied Gonzales any integration credit (and hence local residence, civic activity and broadcast experience credit) because he viscerally regarded Mrs. Polk as "befuddled" and "incapable of carrying out [her] integration pledge" to manage at the new station. *I.D.* at para. 116. Indeed, he continued that the Gonzales ownership structure "is a classic sham," *id.,* and that "Sue Gonzales Polk is nothing more than a comparative front for her husband." *Id.,* at para. 95.

6. *Discussion.* As expressly noted by the Supreme Court in *Metro Broadcasting, Inc. v. FCC,* 110 S. Ct. 2997, 3025 n.48 (1990), "[t]he FCC's Review Board, in supervising the comparative hearing process, seeks to detect sham integration credits claimed by all applicants...." *Accord Marlin Broadcasting of Central Florida, Inc. v. FCC, supra* note 2. That particular supervision is unabated. *See, e.g., Annette B. Godwin,* 8 FCC Rcd 4098, 4103-05 (Rev. Bd. 1993); *Gloria Bell Byrd,* 7 FCC Rcd 7976, 7978-80 (Rev. Bd. 1992), *review denied,* FCC 93-460, released October 1, 1993.[8] The Board has been no less vigilant to filter out other species of applicants where, to disingenuously seek a special pref-

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such issues before BBL could be found basically qualified. *See generally Royce Int'l. Broadcasting,* 5 FCC Rcd 7063, 7065 n.6 (1990)(egregious misrepresentation of ownership structures)(subsequent history omitted). Such a hearing would necessarily include a basic financial issue also, in light of Ms. Bolton's testimony that she had no idea how her alleged "partners" would provide construction or operating funds. *See Remand Order,* 5 FCC Rcd at 6315-16.

[4] MBC Exceptions at 5 (emphasis added). The ALJ did originally add basic qualifying issues against three applicants. *I.D.* at para. 2. But, he refused to add basic issues against any other applicant. *See also, e.g.,* Gonzales Exceptions at vi, 35-44; BBL Exceptions at 19-20, 25-26; RML Exceptions at ii, 24-29. We have already commented upon these errors, *see Remand Order,* 5 FCC Rcd at 6314, 6323.

[5] The ALJ had complained:

> Anyone who studies this voluminous evidentiary record will soon discover that from both an academic and public interest standpoint this wasn't a well-tried case. On a scale of 0 to 10 (10 being a well-tried case), this one rates about a 4. Now it wasn't that we lacked skilled attornies [sic]. We had a roomful of talent. Rather it was the way these advocates *elected* to try their case.

I.D., Concls. at para. 3 (footnotes omitted; original emphasis). Whatever the accuracy of that lament, and as signified in our *Remand Order,* neither was the case "well-tried" by the ALJ, whose scatter-gun treatment of the applicants was partially described in our *Remand Order* and will be further discussed in this text as we deal specifically with certain individual applicants.

[6] Gonzales Exceptions at 5-6.1

[7] While stating that "[i]t was impossible to ferret out the truth with Ms. Polk" who -- during nearly 13 hours of cross-examination -- corrected many apparent (and minor) "discrepancies" in her testimony, *I.D.* at para. 115, the ALJ simultaneously declared "[t]his is *not* a definitive finding that Sue Polk *deliberately* lied," but rather "[t]his poor woman was really out of it...." *I.D.* at n.30 (original emphasis). That footnote went on to ventilate:

> The Presiding Officer has lost all respect for white, non-Hispanic males who use their wives, or daughters or female friends as comparative fronts, knowing full well that they do not possess the aptitude to own and operate a broadcast station.

Id. The Board has examined, *de novo,* the testimony of Ms. Polk and agrees with the ALJ and Gonzales that the so-called "discrepancies" over minutiae regarding corporate details, *etc.* reveal not the slightest intentional lack of candor. Further, we find nothing remarkable in the fact that, whereas most of the Polks' assets were held in the husband's name, they testified that they considered the assets mutual. *See I.D.,* paras. 100-105. Especially in marriages of those persons of an earlier era, this arrangement was not necessarily atypical.

[8] In *Evansville Skywave, Inc.,* 7 FCC Rcd 1699, 1700 (1992), the Commission said that use of the term "sham" was "confusing"

erence,[9] a male venturer poses a wife,[10] a daughter,[11] a sister,[12] or even a paramour[13] as a false owner. We concur with the ALJ that FCC archives are rife with such miscreants. For a more expansive comment on the Board's view of this phenomenon, *see Religious Broadcasting Network*, 3 FCC Rcd 4081, 4088 (Rev. Bd. 1988).

7. However, unlike BBL which is perforce a model hoax, *see Remand Order* (and cases cited therein), the Gonzales application bears *none* of the hallmarks of that ubiquitous genre. That is, we are obviously not here faced with the case of migratory profiteers purportedly giving away equity and *exclusive* control of the contrived entity to a virtual stranger (invariably ignorant of the rudiments of the subject broadcast proposal) in order to cynically exploit minority (or, previously, gender) preferences. *Compare, e.g., Gloria Bell Byrd, supra*, 7 FCC Rcd at 7978-80 (and cases cited therein). Neither does the Gonzales profile correspond to the other varieties of false ownership structures exemplified by the cases referenced in notes 10-13, *supra*. The more dubious ownership structures involving the applications of married couples are typified in cases such as *N.E.O. Broadcasting, supra* note 10, and in *Richard P. Bott, II*, 4 FCC Rcd 4924, 4928-30 (Rev. Bd. 1989),[14] where the broadcaster-husband, active in *all* facets of the advent of that application, subsequently denied *any* slight interest in the application filed solely in his wife's name. *See also Progressive Communications, Inc.*, 3 FCC Rcd 5758, 57-60 (Rev. Bd. 1988)(husband, originally 49% owner, withdraws "in name only," but admittedly intended to be known as "the boss").[15]

8. Rather, in the Gonzales application we are confronted with a factual framework similar perhaps to that encountered in *Marlin Broadcasting, supra*. There also, a husband/wife applicant claimed majority ownership and control by the wife. *See* 952 F.2d at 509-510.[16] While that couple did not justify their (amended) 95%/5% ownership split for the wife and husband, respectively, they did ultimately receive a combined 100% integration credit because the record, as the court agreed (*see supra* note 16), did substantiate their proposal to jointly own and manage at the station. *Pari causa*, there is no reason upon this record to objectively question whether, as they had done with WYNX(AM), Mr. and Mrs. Polk will together operate the new FM station. As to the claimed ownership split placing a 51% *de jure* interest in the wife, and while doubts will be inevitable to many observers as to the Polks' ultimate *de facto* arrangements,[17] the record before us provides no substantive evidentiary basis for affirming the ALJ's com-

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and monished against its use. *But cf. R. J. Winter*, 7 FCC Rcd 2235, 2236 (1992)(Comm'n later reinvokes term "sham"). The *I.D.* and the pleadings appertaining thereto antedate *Evansville*.

[9] At the time the instant applications were filed, both the minority and gender preferences were in force. The minority preference was later upheld in the Supreme Court's *Metro Broadcasting* decision; the gender preference was struck in *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992).

[10] *See, e.g., N.E.O. Broadcasting Co.*, 103 FCC 2d 1031, 1033-36 (Rev. Bd. 1986).

[11] *See, e.g., Shawn Phalen*, 7 FCC Rcd 623, 623-26 (Rev. Bd. 1992)(*vacated* administratively solely to facilitate settlement), 7 FCC Rcd 7638 (1992).

[12] *See, e.g., Royce Int'l Broadcasting*, 4 FCC Rcd 7139, 7144-47 (Rev. Bd. 1989).

[13] *See, e.g., Ocean Pines LPB Broadcast Corp.*, 5 FCC Rcd 5821 (Rev. Bd. 1990).

[14] *Review denied*, 5 FCC Rcd 2508 (1990), *aff'd mem. sub nom. Radio Representatives, Inc. v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991). *But cf. Richard Bott, II*, 8 FCC Rcd 4074 (1993)(hearing designated when winning applicant proposes to sell construction permit less than one year after grant).

[15] *Review denied*, 5 FCC Rcd 7058 (1990), *aff'd mem. sub nom. Bell County Broadcasting Co. v. FCC*, 950 F.2d 797 (D.C. Cir. 1991).

[16] In *Marlin*, the marital partners originally filed showing the wife with a 51% equity interest in the "general" partnership component, the husband 49%. At the eleventh hour, they sought to change the controlling ratio to 95% for the wife *vis a vis* 5% for the husband, purely and admittedly in order to strengthen their gender preference. Based on the facts of that case, and since there appeared no doubt that both partners would, in fact, control and manage the station, the Board regarded the partners constructively as 50%/50% owners, thus diminishing the gender preference but still yielding overall a 100% integration factor. The court considered the Board's action and said (952 F.2d at 511-512):

> We must also address the Commission's authority to adjust an application to reflect accurately the actual division of management responsibilities among the applicant's general partners. We have found no statute or case law prohibiting the Commission from taking such action. Furthermore, the Commission enjoys broad discretion to interpret and apply its own policies. *New South Broadcasting Corp. v. FCC*, 879 F.2d 867, 870 (D.C. Cir. 1989). The Commission has held that an applicant may "structure its proposal in a manner that is believed most likely to prevail in a comparative proceeding if the proposal is *bona fide*. " *KIST Corp.*, 102 FCC 2d 288, 292 n.9 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986)(mem.), *cert. denied*, 481 U.S. 1050 (1987). But the requirement that an application be *bona fide* does not require the Commission to dismiss an application which, in its opinion, does not reflect the true division of managerial responsibility among an applicant's general partners. The Commission has the discretion, in furtherance of its goal of maximizing service to the public, to attribute ownership interests based on its record review of the manner in which the applicant will operate.

[17] It cannot be denied that anticipating a mathematically precise percentage of *de facto* "control" between married co-owners in an ordinary marital situation is often difficult, and just as often artificial. Putting aside obvious false-front situations, *see, e.g., N.E.O. Broadcasting, supra; Progressive Communications, supra*, or the recurring probability of undeclared interests of husbands, *see, e.g., Bott, supra*, the Board has been presented with mutations that raise ineluctable doubts as to the practical likelihood of the purported structure. *See, e.g., Chester Associates*, 2 FCC Rcd 2029 (Rev. Bd. 1987), where the Board was exceedingly skeptical of an eleventh hour switch to a "limited partnership" wherein the wife (upped to 65% equity) would be the sole "general" partner, while her lifetime broadcaster husband (35% equity) would allegedly remain absolutely passive in the operation of their jointly owned station, despite the wife's total inexperience. The Commission itself has long vexed over the treatment of the media interests of marital partners. *See generally Spousal Attribution*, 7 FCC Rcd 1920 (1992); *Absolutely Great Radio, Inc.*, 92 FCC 2d 1171 (Rev. Bd. 1983)(Board suggests that agency not try to predict whether marital partners will be "spouse-like or mouse-like"), *modified*, 95 FCC 2d 1023 (1983)(Comm'n rejects suggestion), *vacated and remanded in pertinent part sub nom. Ventura Broadcasting Co., Inc. v. FCC*, 765 F.2d 184 (D.C. Cir. 1985). Upon the court's remand, and in general however, the Commission now holds that (barring estate planning purposes) even the interests of married joint tenants

plete denial of integration credit to Gonzales, or the local residence, civic activity or broadcast experience credit that appends.[18]

9. Inasmuch as Gonzales is, under the precedent controlling the factual elements of their particular situation, entitled to 100% integration credit (augmented by long-time service area residence, civic activities and broadcast experience), most of its competitors could not prevail even if we granted the exceptions lodged about their own respective treatment by the ALJ. However, we hold that the ALJ did not err in many bedrock respects in his *eventual* disposition of the instant applications, save of course for his decisional mistakes with respect to BBL and Gonzales, calling the latter a "classic sham" when it is not, while the former is manifestly nothing more than a tarradiddle. Albeit, we address the critical aspects of the treatment of the other six applicants in the *I.D.* and *S.I.D.*, as we regard certain of their key exceptions.

10. *MABLETON BROADCASTING CO., INC.*. The *I.D.* was harshly critical of MBC, finding, *inter alia*, that its corporate organizational structure was a "sham" attended by falsified corporate minutes; that its principals concocted a scheme to defraud with respect to partnership contributions; and, finally, the *I.D.* reached a conclusion that one of the two MBC corporate "partners" was a "thief ... who has stolen $5,000 worth of corporate funds..." and that "the application [was] put together by two individuals who are little more than petty swindlers [who] needn't be given any serious consideration." *See id.*, paras. 68-94.[19] Putting aside the ALJ's *ultra vires* invective effectively concluding criminal conduct, the Board does concur with the ALJ that MBC's deliberate untruthfulness in the prosecution of this application was so blatant and so gross that it is basically unqualified for this broadcast permit.

11. *Discussion*. The Board need go no further than to agree that, in a deceitful and unpardonable endeavor to impart *bona fides* to this two-person corporation (putatively, Vanessa O. Gragg, 51% equity; Thomas L. Giglio, 49% equity), the record corroborates that: (1) the MBC principals conjured a fictitious corporate organizational meeting allegedly held on July 22, 1987 and, several months later, composed equally fictitious corporate minutes of that non-existent July 1987 meeting;[20] and (2) Giglio devised a dodge whereby, in order to simulate a $12,750 capital contribution by Gragg, Giglio himself funneled that dollar amount through a third party (Fleetwood Gruver) and thereafter created "a trail of multi-party checks" in hope that the money could not be retraced to Giglio.[21] MBC denies none of the essentials of these acts, but sloughs them off as immaterial claiming that MBC was created before July 1987 in any event[22] ; and, as to the bogus capital contribution scheme, "no one from MBC has ever told anyone (the Commission or anyone else) that Ms. Gragg paid her own money for her stock."[23]

12. Filed in 1990, MBC's exceptions relied upon certain language of *Silver-Star Communications-Albany, Inc.*, 3 FCC Rcd 6342, 6349-50 (Rev. Bd. 1988).[24] MBC contends that the ALJ's denunciation of it on character grounds was "particularly inappropriate" in the absence of the designation of a special misrepresentation issue. But, even in

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in a broadcast entity are to be considered discretely for *quantitative* and qualitative integration credit purposes. *Absolutely Great Radio, Inc.*, 104 FCC 2d 1 (1986) (subsequent history omitted). As we have indicated, though, there is no record basis for denying the *de jure* arrangement between the Polks (she *does* legally own 51% of the corporate shares), and we find no reason to legitimately question whether they will share management duties (as well as ownership). While we cannot assure that, in the strata of connubial topography, Mr. Polk will not, at least on occasion, have a disproportionate influence, 100% full-time aggregated integration credit for the Polks seems not inappropriate from the undisputed evidence at hand. *See Marlin Broadcasting, supra*. *Compare H. S. Communications, Inc.*, 8 FCC Rcd 3237, 3237 n.3 (1993)(Comm'n modifies Board by raising, from *zero* percent to 30%, integration credit of married applicants where it found that, at the least, husband would participate in day-to-day management; *Royce Int'l* and *Progressive Communications* there distinguished by Comm'n).

[18] The credit sought by Gonzales for local residence and civic activities, but rejected by the ALJ, after they moved to Mableton itself in 1987 is entitled to little weight, as acknowledged by the applicant. Gonzales Exceptions at 13 n.12. Gonzales also sought a minority preference for Mrs. Polk, *see id.*, at 15-16 n.14, but we find the record insufficient to make a definitive judgment. *See I.D.*, paras. 214-220; *see generally also Lone Cypress Radio Associates*, 7 FCC Rcd 4403, 4406-07 (Rev. Bd. 1992), *review denied*, FCC 93-429, released September 8, 1993, and the matter not likely decisional in any event.

[19] As indicated at the outset of this *Decision*, and much as with at least half of the remaining applicants, the *I.D.* also made adverse findings on MBC's financial certification and its transmitter site certification, despite having added appropriate issues on neither matter. *See id.*, at paras. 80-83; *see also* MBC Exceptions at 5 & n.7; 8-9. Because, upon our previous review of the *I.D.*, the Board had discerned such an egregious lack of candor on the part of MBC that it could not be regarded as basically qualified, it found no need then to remand MBC also on separate financial and transmitter site issues, which positively would be mandated were MBC not otherwise plainly disqualified.

[20] *See I.D.*, paras. 76-78.

[21] *See id.*, paras. 86-92.

[22] MBC Exceptions at 13-15. It further asserts that Gragg's testimony about personally reviewing the July 1987 corporate minutes and her receipt of MBC stock certificates on September 1, 1987 "was withdrawn by MBC at the admissions session, along with other testimony relying on the dates of documents prepared from MBC's corporate package." *Id.*, at 15. But, MBC nowhere denies the underlying *factual* basis for the ALJ's harsh findings or denies that its originally proffered "corporate package" was knowingly fabricated.

[23] *Id.*, at 16. MBC does not deny that its entire capital contribution scheme was calculated to make it *appear* otherwise. Much as with its counterfeit corporate meeting and minutes, MBC counsel is reduced to an "abandonment" defense and to this claim (*id.*):

> When Mr. Giglio recognized the true nature of the transaction he designed, he abandoned it. Tr. 1091-92. Such a plan, if maintained, would have required Mr. Giglio to refrain from providing funds directly to Vanessa Gragg. However, on December 29, 1987, Mr. Giglio wrote Ms. Gragg a $12,250.00 check for a stock purchase. RML Ex. 20. Clearly, as of December 29, 1987, Mr. Giglio knew MBC would not claim Ms. Gragg paid for her own stock and, in fact, MBC never made such a claim.

Giglio, however, recognized the "true nature" and of his slippery machinations from the outset: that it took until December 1987 to conclude that it would not "fly" says all that is necessary about the character of MBC and its dishonest principals.

[24] Citing *West Coast Media, Inc. v. FCC*, 695 F.2d 617, 620 (D.C. Cir. 1982)(specific misrepresentation issue there required).

Silver-Star the Board acknowledged the exception enshrined in *RKO General, Inc. v. FCC*, 670 F.2d 215, 229-30 (D.C. Cir. 1981),[25] that an applicant may be disqualified where the lack of candor is so blatant and openly contemptuous that a special evidentiary hearing would be superfluous. The Commission has recently ratified and utilized that *RKO General* principle in two cases, disqualifying applicants on candor *cum* character grounds without first trying discrete untruthfulness issues. *Maria M. Ochoa*, 8 FCC 2d 3135 (1993); *Richardson Broadcast Group*, 7 FCC Rcd 1583 (1992), *aff'd per judgment sub nom. Younts v. FCC*, 995 F.2d 306 (D.C. Cir. 1993). Given so "perfect" a record, and MBC's own exceptions as to its clumsy chicanery, the ALJ's denunciation of MBC's character in these two respects was not unjustified. MBC has forfeited its basic qualifications. *Ochoa; Richardson; RKO General.*[26]

13. *VOTH BROADCASTING CO.* Finding that Voth (1) proffered a late-filed integration statement that neglected to substantively comply with his Prehearing Order so that Voth's competing applicants could not adequately engage in discovery; (2) was unprepared to exchange its direct case at the prehearing conference; (3) failed to attend "many hearing sessions"; and (4) ignored the ALJ's direct order to file full proposed findings of fact and conclusions of law, *see* 47 CFR §§ 1.263-64, the ALJ dismissed Voth's application. *I.D.*, paras. 6-9. Voth defends its half-hearted prosecution of its application by stating it "would have incurred tremendous expense in prosecuting an application that at the time appeared to have scant chance of success." Exceptions at 3. Voth goes on (*id.*, at 3-4):

> Mr. Voth is the 51% partner; his wife only 49%. Even as an integrated applicant, their only chance of prevailing would have been if every one of the integrated applicants was refused its claimed integration credit and/or disqualified. Although, paradoxically, that has now occurred with respect to eight of those applicants and -- as will be demonstrated below -- should also be the fate of the ninth (Bolton Broadcasting Limited ("BBL")), the chances of that occurring appeared at the time to be so close to astronomical that the cost of contesting all of the other applications could not have been justified.

Given what appeared at the outset to Voth to be a "scant" chance of prevailing (*id.*, at 4; footnote omitted):

> Voth could, and did, limit its participation: *i.e.*, not engage in further discovery, not contest the admission of the affirmative cases of, or cross-examine the principals of, any other applicant and -- when the time came -- limit its findings and conclusions to those that related to its case.

14. *Discussion.* Apart from the fact that Voth's analysis of a "scant" chance of triumph was and is correct, though its defense contralogical (*i.e.*, the weaker its own chance, the weaker its challenge of the competing applicants), Voth's several failures to comply with express ALJ orders is, we believe, sufficient under the conditions specified by the court to affirm Voth's dismissal. *See Communi-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989). Notwithstanding the broad discretion afforded Commission ALJs in regulating the course of multi-party comparative hearings (18 applicants originally filed mutually exclusive applications), and this agency's institutional reluctance to interfere with an ALJ's interlocutory orders, *see, e.g., Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986), *appeal dismissed mem. sub nom. Punta Ybel Communications, Ltd. v. FCC*, No. 86-1670 (D.C. Cir. Feb. 29, 1988), Voth could have sought appeal of any ALJ hearing order to this Board if it felt grievously mistreated. *See* 47 CFR § 1.301(b).[27] Under all of the circumstances of this case, the Board finds no profitable basis upon which to overturn the ALJ's dismissal of Voth, particularly when Voth all but dismissed itself *ab initio*.

15. *METROPOLITAN MANAGEMENT CORPORATION.* As our *Remand Order* observed, MMC presented the Board with another example of the ALJ's withholding only comparative ownership integration credit, yet doing so primarily on the basis of his view of a misrepresented MMC ownership structure, faulty finances, as well as "stonewalling discovery" tactics and lack of a "serious effort to prosecute its application."[28] *See* 5 FCC Rcd at 6323 (referencing *I.D.*, paras. 131-142). Consequently, the Board had no option but to remand MMC's application for attention under appropriate hearing issues. After a supplemental hearing on four such issues, *see S.I.D.*, para. 2, the ALJ found that MMC was not financially qualified, *id.*, paras. 5-57; that MMC misrepresented its ownership structure, *id.*, paras. 58-65; and that MMC had abused the Commission's processes. *Id.*, paras. 66-67. Because we affirm the ALJ's conclusion that MMC is not financially qualified, *see id., Concls.*, paras. 5-11, we will address neither the other MMC issues nor the exceptions thereto.

16. As the *S.I.D.* chronicles, and even putting aside for the nonce the admitted inaccuracies in MMC's putative "budget" for this FM facility,[29] the record undergirds the ALJ's conclusion that MMC failed utterly to accord with the Commission's standard for having "reasonable assur-

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[25] *Cert. denied*, 456 U.S. 927 (1982).

[26] In light thereof, MBC's lesser exceptions (*e.g.*, evidentiary rulings on integration) are entirely non-decisional. *See also supra* note 19.

[27] The better practice, we believe, would have been for the ALJ to dismiss Voth outright when its cumulative derelictions occurred (rather than awaiting issuance of the *I.D.*); prompt action would have afforded Voth immediate appeal rights and an expeditious resolution under 47 CFR § 1.301(a)(1). *See also Communi-Centre, supra.* It would have also avoided confusion over the time limits on Voth's challenge of its dismissal, as witness the Motions to Strike filed by BBL on May 24 and August 10, 1990, which were denied in our *Remand Order*.

[28] Nonetheless, and unlike with Voth, the ALJ did not dismiss MCC's application for the derelictions complained of in the *I.D.*

[29] *See I.D.*, paras. 5-42, where MMC's president, Randall Mangham, concedes that his draft budget (over which the ALJ believes Mangham dissembled, *see id.*, paras. 8-10), was cribbed from a counsel-provided budget for an AM radio station, but the equipment was materially unrelated to the *FM* station here sought. And, Mangham not only conceded that his budget of $3,000 for 3 announcers for the inaugural 3 months was in error, but he could not explain which of the equipment would be purchased and which would be leased, or why more than $2,000 per month in (alleged) transmitter site rental costs were not in the budget. These glaring deficiencies alone are, doubt-

ance" of adequate financing. MMC's budget expressly contemplated financing from "[i]ndividual partners and limited partner." *S.I.D.* at para. 11 (quoting MMC Budget). It nonetheless sought a bank loan. After several sources declined to offer a loan to MMC, its president, Randall Mangham, contacted his former professor at Howard University, who in turn had been one of the founders of Independence Federal Savings Bank of Washington, D.C. *Id.*, paras. 18-19.[30] Meeting with the professor at his personal office, not a bank facility, Mangham supplied the 0 professor with only a model loan letter (obtained purely as a template from Barnett Bank by former counsel). However, Mangham provided no documentation of his (or MMC's) assets, though he says he might have shown the professor a copy of his "budget" (*see supra* note 29). While Mangham submitted no semblance of a loan application, he and the professor discussed the wording of the model Barnett Bank letter. *S.I.D.*, para. 23. Indicating to Mangham at that time that, in his official bank capacity, issuing such a letter was not a function the professor would ordinarily perform, the professor here testified that he agreed to supply a letter so long as (1) the letter not include language suggesting "a commitment to lend," *id.*, at para. 24; and (2) the letter did not imply that Mangham had shown real estate equity sufficient to support the loan. *Id.* Finally, the professor never discussed a potential loan to MMC with any authorized loan official at the bank, nor could he remember at hearing any basic detail such as loan amount,[31] loan period, interest rate, *etc. Id.*, paras. 24, 26. At hearing, the professor testified that he believed the letter to be in the nature of a "recommendation," much as a letter he would write for a law student seeking a job, and the professor attached no particular significance to the letter until after he was deposed. *Id.*, para. 26.

17. But, the ALJ cautions that what sketchy depiction of the initial Independence Federal "letter" appears in the record is only a *post-hoc* oral reconstruction, since neither Mangham, the bank, the professor nor MMC counsel could produce the "letter": all swore they retained no copy and nothing tangible was produced at either hearing. *Id.* When, in 1989, MMC's financial qualifications were challenged, (former) MMC counsel -- without Mangham's participation -- met with a bank vice-president, Neville Campbell-Adams, who provided a different letter to counsel. But not included in that second letter was mention of any tentative bank "commitment"; indeed, unlike a prior bank letter which misidentified the location of MMC's proposed station as "Silver Springs, Florida," the second letter mistakenly specified "Atlanta, Georgia," not the nearby town of Mableton. *Id.*, at para. 31. Finally, (*id.*, at paras. 32-34; footnote omitted):

> As of May 5, 1989, Campbell-Adams had never met Mangham. He didn't know anything about him. He had never received any documentation regarding the loan request or issuance of the letter. Campbell-Adams does not consider the May 5, 1989 letter a commitment but "a letter of interest" (Tr. 8234). He pointed out that if IFSB had made a $300,000 loan, Mangham would have been required to secure it with a certificate of deposit at IFSB for more than that amount. The reason it would have to be more than the loan, says Campbell-Adams, is because the bank will only lend up to 90% fo [sic] the value of the certificate of deposit. (Tr. 8238-39, 8255-8256).
>
> Mr. Campbell-Adams further states that IFSB wouldn't consider the value of Mangham's law practice or his Atlanta area real estate as collateral for the loan. Campbell-Adams related these conditions to [former MMC counsel] Hart during their meeting and Hart said that Mangham would have a sufficiently substantial certificate of deposit in the bank to cover the loan amount (Tr. 8340-41).
>
> Mangham was not involved in the effort to secure the IFSB loan letter. In fact, as of April 5, 1981, Mangham had never met Campbell-Adams, and had never even spoken to him on the telephone.

In March 1991, MMC retained different counsel, and it proferred a revised budget and a third letter from the bank. *S.I.D.*, paras. 35-37. Upon hearing all of the evidence, the ALJ held that in addition to its failure to seriously compute its actual budgetary costs (*see supra* note 29), MMC was not financially qualified when it so certified on July 10, 1987. *Id.*, para. 53. In light thereof, and not considering for immediate purposes the ALJ's adverse conclusions on the ownership misrepresentation and abuse of process issues, the ALJ found MMC not basically qualified. *S.I.D., Concls.*, paras. 5-14.

18. *Discussion.* We must affirm the conclusion of the *S.I.D.* that MMC was not financially qualified when it so certified. Not only does MMC concede the serious inaccuracies in its "budget," including the fact that the budget expressly contained "a reference to partner and limited partners," MMC Exceptions to *S.I.D.* at 5, flaws that would likely eliminate MMC under one prong of the test underscored in *Northampton Media Associates*, 4 FCC Rcd ' 5517, 5519 (1989)(applicant must show serious effort to obtain construction and operating costs and corresponding finances), *aff'd on other grounds*, 941 F.2d 1214 (D.C. Cir. 1991), MMC here failed utterly to meet a second prong of *Northampton* which requires an applicant, when called upon, to prove by a preponderance of the evidence -- even if by later evidence "reconstruction"[32] -- that at the time of application certification:

> [a]n applicant for a new station must attest it has *sufficient net liquid assets on hand, or committed sources of funds* to construct the proposed facility and operate for three months, without revenue. *Revision*

less, sufficient to cripple MMC's original financial certification. *See Pepper Schultz*, 5 FCC Rcd 3273 (1990), *aff'd per judgment*, 927 F.2d 1258 (D.C. Cir.), *cert. denied*, 112 S. Ct. 453 (1991).

[30] The professor was also the bank's counsel, secretary and its "second or third largest stockholder." *S.I.D.* at para. 19.

[31] The professor testified that he thought the requested loan amount was probably $200,000, but was "reminded" sometime before the hearing by MMC that the amount discussed was $300,000-$350,000. *S.I.D.*, para. 27.

[32] The *Northampton* court explicitly refused to affirm the Commission's legal position that, under the FCC requirements then in effect, a certifying applicant need not possess contemporaneous documentation of its finances, but might (years later) "reconstruct" its "documentation." However, the Commission just recently stated its allegiance to the position it had previously adopted in *Northampton; see Emision De Radio Balmaseda, Inc.*, 8 FCC Rcd 4335 (1993), and this subordinate Board is bound by that latest Commission case.

of Application for Construction Permit for Commercial Broadcast Station, 50 RR 2d 380, 388 (1981). Tr. at 458, 597, 688; 3 FCC Rcd at 575 ¶ 52.

4 FCC Rcd at 5518 (emphasis added). In determining whether an applicant can legitimately claim "committed sources of funds" from a lender, an applicant must demonstrate the tentative commitment indicia set forth in *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1893, *recon. denied*, 6 FCC Rcd 4626 (1991), *aff'd mem. sub nom. Mid-Ohio Radio, Ltd. v. FCC*, No. 91-1418 (D.C. Cir. March 26, 1993).

19. Despite the testimony of the professor affiliated with Independence Federal that he considered his personal letter (*i.e.*, not on the bank's letterhead) to Mangham as in the nature of a "recommendation" letter for a job-seeking student, and MMC's concession that the professor "did not review MMC's credit history, business plan or other documentation"[33] relevant to the proposed station or Mangham and/or any hypothetical "partners," MMC asserts that the professor's 1987 personal "letter" was not a mere accommodation. But not only was no 1987 "letter" ever produced, MMC admits "the inability of MMC's witnesses to recall the precise terms of the letter" (*e.g.*, loan amount, or any terms, or nature of collateral).[34] Under the undisputed circumstances of record, even had MMC provided some palpable documentation of the missing "loan letter" upon which MMC grounded its sworn financial certification, MMC here proved nothing of affirmative significance under the Commission's explicit certification requirements. *See Northampton; Scioto*. In truth, any such "letter" -- perforce as described by MMC and its own witnesses -- was the quintessential "accommodation" of the genre recently discussed at length in *Fox Television Stations, Inc.*, 8 FCC Rcd 2361, 2429-46 (Rev. Bd. 1993)(and cases cited therein). Especially, *see Liberty Productions*, 7 FCC Rcd 7581, 7584 & n.14 (1992); *Christina Communications*, 2 FCC Rcd 1871, 1874 (1987)(financial issue designated because, despite bank letter, "it is clear that that the [several] applicants' individual qualifications" were not fully considered by the issuing bank). Having conclusively *disproved*, by dint its own evidence, any efficacy in its sworn financial certification, MMC's later (but equally ineffective[35]) grasps at repairing its finances are immaterial. *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991); *see also Capital City Broadcasting Co.*, 7 FCC Rcd 2629 (1992). Perceiving no fault with the *S.I.D.* on the objective matter of MMC's glaring record failure to substantively support its initial financial certification, or MMC's consequential disqualification by the ALJ based thereon, we need not belabor MMC's exceptions (or the responses of the other parties) relating to other more subjective aspects of the *S.I.D.* Suffice it that, blaming former counsel, *see e.g.*, MMC Exceptions to *S.I.D.* at 12 n.11; 15 *et seq.*, MMC seeks even larger relief from its own meritless case. We are unmoved. *See Hillebrand Broadcasting, Inc., supra.*

20. *JELKS.* Reminiscent of cases such as *Carol Sue Bowman*, 6 FCC Rcd 4727 (1991), and the companion case of *Sharon Annette Haley*, 6 FCC Rcd 4630 (1991), *consolidated appeals denied mem. sub nom. Prater & Durham v. FCC*, 983 F.2d 298 (D.C. Cir. 1992),[36] as well as the earlier case of *Edwin A. Bernstein*, 5 FCC Rcd 2843 (1990), *aff'd per judgment sub nom. Lefebvre v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991), Jelks filed his instant application with the certification that he was *not* financially qualified,[37] but his application averred: "Applicant will file an amendment relating to his financial qualifications in the near future." *I.D.* at para. 11. As the ALJ reports, "he never did," *id.*, and the ALJ elaborates that (*id.*, at para. 15; original emphasis):

> [i]n any event, on November 16, 1988, the Presiding Officer called on Jelks to explain why he never lived up to his July 10, 1987 representation. *See* FCC 88M-3900. At the hearing Jelks was unable to adequately explain why he didn't amend his application as he represented he would. The record shows that it wasn't until late 1987, about five months after he filed his application, that Jelks received an acceptable loan commitment letter from his communications counsel (Jelks Ex. 6, p.2; Tr. 4167). But he made no *concerted* effort to secure a loan letter that would pass Commission muster until the summer of 1988 (Tr. 4157-4158, 4171), and he didn't try to enlist his counsel's help in obtaining an adequate bank letter until the late fall of 1988 -- well after Gonzales has filed its Petition to Enlarge Issues against him (Tr. 4191-4194). Jelks was well aware all along of the representation he had made in BPH-870710MZ; *i.e.*, that he would file a financial amendment "... in the near future."

The ALJ held that not only was Jelks disqualified on financial grounds, this applicant also misrepresented on his application that he would amend his finances "in the near future." *I.D., Concls.*, paras. 9-10. Finally, the ALJ reported that Jelks filed no amendment by the December 1988 hearing designation, and had not even done so by the April 1990 date of the *issuance* of the *I.D. See id.*

21. *Discussion.* While admitting that, irrespective of his 1987 application oath to file a financial amendment expeditiously "[n]o such amendment was [ever] filed," Jelks Exceptions at ii, Jelks argues (1) that -- exactly as in *Edwin A. Bernstein* and *Sharon Annette Haley* -- the Mass Media

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[33] MMC Exceptions to *S.I.D.* at 9.

[34] *Id.*, at 10.

[35] Just as an example, MMC's later interactions with Independence Federal called for Mangham to place as security with the bank a certificate of deposit *in excess* of the $300,000 loan amount requested. MMC Exceptions to *S.I.D.* at 12 n.11. Whether, as an academic matter, MMC could or would ever have met the bank's extraordinary prerequisite is patently problematic. *See S.I.D.*, para. 39; *Concls.*, para. 11.

[36] By coincidence, perhaps, counsel in the two *Prater & Durham* cases also represents Jelks in this proceeding.

[37] Prior to its *Revision of Application* (FCC Form 301), 4 FCC Rcd 3853, 3859, (1989), and despite its then-extant "hard look" application processing requirements and 47 CFR § 73.3564 (completeness of applications); *see also, e.g., Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991)(summary application dismissal for *slightest* deficiency under "hard look"); *Russian River Vintage Broadcasting v. FCC*, No. 92-1236 (D.C. Cir. Oct. 8, 1993), it was at that time the practice of the Mass Media Bureau's processing line staff to accept as "complete" an FM radio station application with a negative financial certification. The Commission's 1989 *Revision of Application* ended that troublesome practice.

Bureau's hearing designation order mistakenly neglected to specifically note a financial issue against Jelks; and (2) that after the ALJ granted an opponent's motion to add a financial issue (and *sua sponte* added a related misrepresentation issue), Jelks later attempted to exchange an exhibit purporting to show that he was (by that time) financially qualified. Because Jelks made no attempt to either amend his application or show "good cause" for such an amendment as required under 47 CFR § 73.3522, the ALJ sustained an objection to Jelks' belated attempt to enter his purported finances by simple exhibit exchange on March 7, 1989. *See* Jelks Exceptions at 4-6.

22. As we did in *Bernstein* and *Haley*, we shall disregard the weak technical plaint that the Bureau's designation order mistakenly neglected to formally note a financial issue against Jelks. In *Cleveland Television Corp v. FCC*, 732 F.2d 962 (D.C. Cir. 1984), the court brushed away an analogous argument from the Commission itself, *see* 732 F.2d at 965 n.2, 969-970; and, just as in *Cleveland, Bernstein* and *Haley*, Jelks does not and cannot deny notice of his own declared awareness of either his negative 1987 financial certification or his need (nay, sworn promise) of a timely application amendment.[38] Jelks' 1989 attempt to slip some & purported financial data into an exhibit, in disregard of his own application pledge and the express "good cause" requirements of § 73.3522(b)(1), shall avail Jelks no more than it did the applicants disqualified in, for example, *Bernstein, Haley* and *Bowman*. The Commission long ago trumpeted that it would not "temporiz|e| with flawed proposals," *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134 n.7 (1985); we harken again to that clarion and deny Jelks' exceptions.

23. *QRW PARTNERS*. For much the same reason we remanded the application of MMC, *see supra* para. 15, we instructed the ALJ to hold a supplemental hearing on the matters he raised against QRW in his *I.D.*, but failed to explore under any appropriate qualifying issue. *See Remand Order*, 5 FCC Rcd at 6323. Upon that remand, the ALJ tried three discrete issues against QRW, ultimately disqualifying it on a basic financial issue, and again on misrepresentations as to its original financial certification and its ownership structure. *S.I.D., Concls.*, paras. 24-43. And, as with MMC, we need only conclude for decisional purposes that QRW's exceptions to its financial disqualification are wholly unsatisfactory.[39]

24. The critical problem with QRW's exceptions on that issue is that, whereas it insists repeatedly that is a *bona fide* limited partnership under the stewardship of "general" partner Gloria Watkins,[40] Ms. Watkins' hearing testimony at the two hearings proved irrefragably (1) that her personal financial certification of QRW's application was, at best, disingenuous; and (2) equally at best, her understanding of QRW, its ownership equity distribution and/or the role of its "limited" partners, as well as QRW's financing was all but non-existent. Viewed in a less forgiving light, QRW might be entitled to the colorful opprobrium visited upon it in the *I.D.* and *S.I.D.* We need not go that far, however, to easily affirm the disqualification of QRW on the basic financial issue.

25. *Discussion*. The Board adopts and incorporates by reference the findings of fact set forth in paras. 78-120 of the *S.I.D.*, none of which are disputed directly by QRW nor contradicted by the underlying record. In summary, we find the following facts to be especially probative, particularly in light of the totality of the ALJ's *S.I.D.* findings, in support of the ALJ's adverse conclusions under the basic financial issue: (1) Watkins prepared no construction or operating budget before QRW filed, but relied instead upon (former) counsel's oral suggestion that $500,000 would be needed, *see id.*, para. 80; (2) after being turned down for a loan by a Jackson, Mississippi bank on Watkins' purely oral request, *id.*, para. 81, QRW "limited" partner Porter Sanford suggested that she contact Sun-Delta Capital Access Center, Inc. and speak to its Howard Boutte, from whom she also asked orally a $500,000 loan letter, *id.*, paras. 82-84; (3) however, she provided Boutte no proposed budget, no business plan and/or other financial documentation or a loan application, but she nevertheless certified QRW's FCC application on the same day (July 8, 1987) she sent a letter to Sun-Delta requesting a $500,000 loan letter, *id.*, paras. 85-86[41] ; (4) despite the fact that Sun-Delta would ordinarily require "a business plan, a personal balance sheet, a budget and evidence of creditworthiness on the borrower's part," *id.*, at para. 89, Boutte provided Watkins with a letter purporting to offer QRW a $300,000 (not $500,000) loan, but that letter also contained the express condition that "*Sun-Delta reserves the right to require any equity participation in the* [QRW] *project* ...," *id.*, at para. 88(emphasis added); (5) although (former) QRW counsel advised Watkins that a $300,000 loan was insufficient to cover the "budget" counsel had himself anticipated, and notwithstanding having been unaware of Sun-Delta's critical loan terms, Watkin's certified QRW's

[38] *Mirabile dictu*, Jelks relies heavily upon a staff ruling, *City Light Communications*, 65 RR 2d 1783 (Mass Media Bur. 1989), where as to an initial negative financial certification the Bureau opined:

> The remedy for failure to certify is not dismissal, *but amendment or, failing that, specification of a financial qualifications issue* against the relevant applicant.

Jelks Exceptions at 14-15 (Jelks' emphasis). But, clearly nothing in the Bureau's *City Light* ruling negated the Commission's amendment requirement of § 73.3522 of the rules, nor could it of course. *See Radio Associates, Inc.*, 6 FCC Rcd 2094 (Rev. Bd. 1991)(cited with reliance in the Commission's *Sharon Annette Haley* brief).

[39] QRW repeats its charge that the ALJ should have been disqualified for bias against it, as previously addressed in our *Memorandum Opinion and Order*, 6 FCC Rcd 396 (Rev. Bd. 1991). We continue to believe that, despite his legal errors, the ALJ gave inadequate grounds for disqualifying him altogether, although the intemperate language exemplified in the *I.D.* and his *First Remanded Prehearing Order*, FCC 90M-3647, released November 19, 1990, is, we daresay, scarcely a model of professionalism. Nonetheless, disqualification of the ALJ seemed (and yet seems) unwarranted under the applicable legal standards iterated in our 1991 *MO&O*.

[40] QRW claims three "limited" partners: William Dilday, Henry Flowers and Porter Sanford. *S.I.D.*, para. 82.

[41] The ALJ found material contradictions between Watkins' original hearing and supplemental hearing testimony over Watkins' financial certification timing, and the dispatch of her loan request letter to Sun-Delta. *See I.D.*, paras. 85-86. In any event, no financial documentation was contemporaneously submitted to Sun-Delta, *see id.*

finances in the affirmative anyway, *see id.*, paras. 91-93; (6) moreover, Watkins did not have (or ever see) the financial statements of her "limited" partners at the time of QRW's financial certification, and she never verified *their* financial ability to support the QRW project, *see id.*, paras. 97-101; and (6) not only had Watkins never done business with either Sun-Delta or Boutte, she knew *nothing* pertinent at hearing about Sun-Delta itself (she thought it was "some type of MESBIC" or "office or company or organization"), and admitted that she "had no idea" whether the $300,000 would be available from it, *see id.*, paras. 105-107, never even giving much thought to Sun-Delta's *express* reservation of QRW equity (or the potential magnitude thereof). *Id.*, para. 108.[42]

26. To put it charitably, QRW failed at hearing to prove it had met the Commission's routine financial certification requirements (outlined *supra*, para. 18, in our MMC discussion). Even assuming QRW was intended as some sort of "limited" partnership, its sole "general" demonstrated no more than a vague idea of the costs of its proposed station, no principal ever prepared or verified a serious budget; and QRW's appreciation of Sun-Delta financing on which it casually and prematurely relied was nil, as was any resulting QRW equity structure or source of shortfall funding. Affirming QRW's disqualification under the basic financial issue, we need not here address the exceptions to the adverse character findings set forth in the *S.I.D.*, paras. 37-43. QRW is, for all decisional purposes, eliminated from consideration for this permit.

27. *MABLETON COMMUNICATIONS, LTD.* Having overruled the *I.D.* on a transmitter site issue in our *Remand Order*,[43] we nevertheless accorded with those exceptions complaining of the ALJ's failure to add a basic financial against MCL for those reasons explicated in our prior order. *See* 5 FCC Rcd at 6321-6322. In brief, MCL is a composite of two settling applicants who effectively reapplied here with a (nominal) structure composed of individual applicant Ralph C. Crossley, Jr. (95% MCL equity), and Skywave Communications Corp. (5% MCL equity), the latter an entity (led by Leon R. Perkinson) which had filed applications in at least ten other FM radio markets (*see S.I.D.*, para. 144) for FM construction permits using identical (though dubious) "limited" partnership structures. *See generally, e.g., Evansville Skywave, Inc.*, FCC 93R-46, released September 20, 1993 (*as corrected*). Much as in *Evansville* and several other "Skywave" applications, Ralph Crossley's *personal* financial certification here on behalf of MCL was allegedly based upon "reasonable assurance" of a construction and inaugural operating loan from Anthony P. Schlichte, formerly associated with Bank One, Indianapolis, Indiana. And, also as in *Evansville*, Schlichte in turn claimed to have known Skywave's Leon Perkinson from dealings with Perkinson and his "investors" in connection with cellular radiotelephone applications filed by Midwest Mobilephone in the early-to-mid 1980's. Because only Crossley attested to MCL's finances, but appeared to have had little personal contact with Bank One prior his MCL financial certification, we remanded this application to the ALJ for a full evidentiary hearing on an appropriate issue.

28. Upon remand, the ALJ tried a basic financial issue against MCL, and his findings thereunder are laid out in paras. 136-168 of the *S.I.D.* At the supplemental hearing, Crossley could not produce any 1987 MCL budget; he produced only a single page from a "business plan" -- created *post-hoc* in 1990 -- calling for $650,000 in projected equipment expenses. *S.I.D.*, para. 142. Howbeit, Crossley testified that he had advised Bank One's Schlichte in July 1987 that he needed a loan letter in the amount of only $250,000. *See id.*, para. 141. But the record further reflects that Bank One had no relevant written documentation on this particular Mableton applicant; that Schlichte issued a bank letter essentially upon a 30-second phone call from Perkinson to Schlichte in which no salient information about 95% MCL principal Crossley was transmitted; that none of Skywave's (18) "investors" had yet cognizably agreed to personally underwrite any Bank One loan to MCL; that Schlichte did not even know what equity percentage Skywave would have in MCL; and that Crossley claimed it was not until Schlichte's March 1991 deposition that Crossley himself became aware that Bank One expected *him* to *personally* fund 20% of the project's cost before any loan could be made *and* that Skywave's equity share would have to be *raised* from 5% to 25% *prior to* any prospective Bank One loan. Claiming a "misunderstanding," MCL attempted to switch reliance to a December 1989 letter from Trust Company Bank of Atlanta, but that second bank made demands ranging from a $150,000 infusion of capital from MCL to an SBA-guaranteed loan. Alas, for lack of suitable information on Crossley (or MCL's other "investors") and/or any indication as to whether MCL could or would meet Trust Company's several stiff loan conditions, Trust Company disclaimed at hearing any tentative willingness to commit to a loan agreement with MCL.

29. *Discussion.* On the record before us, we shall affirm the ALJ. MCL's exceptions argue that the Bank One letter was not a mere "accommodation" from Schlichte to Perkinson, relying squarely upon *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978). In view of that steadfast reliance, it baldly asserts that "the amount of information Schlichte had about Crossley, is irrelevant"[44] ; and, while Crossley claims he was -- until Schlichte's deposition -- totally unaware of his personal

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[42] QRW's (former) counsel obtained in March 1991 a second letter from Sun-Delta, saying it would take a passive equity in QRW of no more than 30%, *see S.I.D.*, paras. 115-116, but Watkins never consulted with, or advised, her "limited" partners of this potential equity arrangement and could not personally affirm that they even received copies of that 1991 Sun-Delta letter. *Id.* Additionally, Boutte testified that he never informed QRW's principals about Sun-Delta's usual requirements of a cash equity contribution prior to a loan, and two of QRW's (three) "limited" partners testified that they had no knowledge of that significant capital requirement either. *Id.*, para. 118. For her part, the ALJ reports that "Watkins still isn't sure whether she'll be a 5% or 10% general partner." *Id., Concls.* at para. 40.

[43] In view of his adverse findings on the transmitter site issue, the ALJ had merely assumed that MCL's principal, Ralph C. Crossley, Jr., had necessarily made a parallel "false financial certification," a leap of judgment the Board refused to join. *See Remand Order*, 5 FCC Rcd at 6320. We also relieved MCL of a media "diversification" demerit levied by the ALJ. *See id.*, at 6321.

[44] MCL Exceptions to *S.I.D.* at 7. Although Crossley is here representing MCL *pro se*, it is evident that the exceptions were prepared by experienced communications counsel, the signature page alone having a different typeface and Crossley's signature.

obligation to invest up to 20% ($50,000) prior to any Bank One loan, Crossley now says he is willing to sell his own house to meet that prerequisite. As to Bank One's unequivocal demand that Skywave's equity share be raised from 5% to 25%, MCL submits that the ALJ failed to note that Crossley and Perkinson "have [now] agreed to such an equity increase if Crossley pursues the Bank One loan and that this has been communicated to and approved by Schlichte."[45] As a backstop, MCL also argues the validity of the Trust Company letter, despite that second bank's multiple conditions and the testimony of its loan officer, John Turgeon, that his Atlanta bank may well demand, *inter alia*, an SBA guarantee for any MCL loan.

30. MCL's continued reliance on the 1987 Bank One letter is incredible; at best it proves that MCL's putative 95%/5% ownership structure was (and remains) entirely speculative and unreliable. More directly, the instant record reflects that nothing of substance supported the Bank One letter from the outset, only an outdated connection between Schlichte and Perkinson's Midwest Mobilephone. Since Bank One knew *nothing* of MCL's (nominal) 95% equity holder, let alone the actual composition of the Skywave "investor" component on which Schlichte had allegedly depended, MCL's heavy reliance on *Multi-State* is *prima facie* absurd. *See Fox Television Stations, supra; see generally also Liberty Productions, supra.* Under *Aspen FM, supra,* and in view of the other record evidence, we also agree with MCL that "the validity of the Trust Company Bank letter is somewhat academic."[46] But *everything* about MCL is likewise "academic," from its basal ownership structure to any speculative chance of adequate station financing. Failing to come close to meeting its legal burden on its financial issue, this patchwork of a pseudo-applicant was properly found to be basically unqualified by the ALJ.

CONCLUSION

31. As signaled in our opening paragraphs, we believe that the ALJ erred in denying all ownership/management integration credit to Gonzales, and hence the credit for local residence and civic activities that append thereto. Though we concur with the ALJ that Mrs. Polk's claim to an ethnic preference was insufficiently supported on this record (*see supra* note 18), Gonzales would prevail in any event, certainly after considering the adverse conclusions befalling its seven (7) residual competitors. In that latter regard, it bears special emphasis, we think, that these Mableton applications were filed at the apogee of the Commission's deregulatory experimentation with the comparative hearing process. That experimental latitude, unfortunately, resulted in an epidemic of abuse by hundreds of *faux* applicants and borderline ethical liberties taken by too many members of the bar. *See, e.g., Garden State Broadcasting Limited Partnership v. FCC,* No. 91-1043 (D.C. Cir. June 29, 1993)(court imposes costs upon dishonest, abusive broadcast applicant which brazenly filed triad of frivolous appeals). In successive reactions over the past several years, however, the Commission has taken a battery of remedial measures to deter purely speculative applications, *see, e.g., Revision of Application; supra; Settlement Agreements,* 6 FCC Rcd 85 (1990), *modified,* 6 FCC Rcd 2901 (1991), to thwart spurious applicants at the filing stage, and to police its licensing processes generally. *See, e.g., Proposals to Reform the Commission's Hearing Process,* 6 FCC Rcd 157 (1990); *clarified,* 6 FCC Rcd 3403 (1991); *Richard P. Bott, II, supra* note 14. As the overall record here attests, those remedial actions were well-warranted to restore a modicum of integrity to this hearing process, and most assuredly none too hasty.[47]

32. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed May 28, 1993 and August 3, 1993 by Gonzales Broadcasting, Inc. and filed July 7, 1993 by Mableton Broadcasting Co., Inc. ARE GRANTED, and the respective amendments ARE ACCEPTED for 47 CFR § 1.65 purposes only.

33. IT IS FURTHER ORDERED, That the petition for late acceptance filed May 14, 1990 by Mableton Communications, Limited and the motion for leave to file supplement to brief filed March 10, 1993 by Lorenzo Jelks ARE DISMISSED as moot; the motion to proceed in proper person filed July 15, 1993 by Voth Broadcasting Co. IS GRANTED; and the motion to strike filed July 19, 1993 by Mableton Broadcasting Co., Inc. IS DENIED.

34. IT IS FURTHER ORDERED, That the application of Gonzales Broadcasting, Inc. (File No. BPH-870707MJ) for a construction permit for a new FM station at Mableton, Georgia IS GRANTED; and the applications of Mableton Broadcasting Co., Inc. (File No. BPH-870706ML), Bolton Broadcasting, Limited (File No. BPH-870710MD), Voth Broadcasting Co. (File No. BPH-870710MF), Metropolitan Management Corp. (File No. BPH-870710MY), Lorenzo Jelks (File No. BPH-870710MZ), QRW Partners Limited Partnership (File No. BPH-870710NF), and Mableton Communications, Limited (File No. BPH-870710NQ) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[45] *Id.,* at 8. Of course, Schlichte is no longer with Bank One, and neither that bank nor Schlichte have any records on this entire MCL matter.

[46] *Id.,* at 11.

[47] Mayhaps, too late. *See generally Bechtel v. FCC,* 957 F.2d 873 (D.C. Cir. 1992), *but compare Reexamination of the Policy Statement on Comparative Broadcast Hearings,* 7 FCC Rcd 2664, *Further Notice,* 8 FCC Rcd 5475 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-34

In the matter of

Waivers of Section 90.621(b)
of the Commission's Rules
for Applicants in the Specialized
Mobile Radio Service

ORDER

Adopted: September 15, 1993; Released: October 27, 1993

By the Commission:

1. On October 21, 1992, Motorola, Inc. (Motorola) filed a Petition for Partial Further Reconsideration (Petition) of the *Memorandum Opinion and Order* (*MO&O*) adopted August 4, 1992, in this proceeding.[1] The *MO&O* affirmed our *Report and Order* (*R&O*) adopted July 19, 1991,[2] codifying two methods of short-spacing Specialized Mobile Radio (SMR) facilities and clarifying the standard we use to evaluate short-spacing waiver requests.[3] Motorola seeks reconsideration of this standard. For the following reasons we dismiss Motorola's petition.

2. Motorola petitions us to reconsider the short-spacing waiver policy for SMR stations based upon the 40/30 dBu contour protection ratio. The *MO&O* addressed this very issue, and affirmed the waiver standard established in the *R&O*.[4] On reconsideration, we did not modify the rule adopted by the *R&O*. Therefore, pursuant to Section 1.429(i) of the Commission's Rules, 47 C.F.R. § 1.429(i), we dismiss Motorola's Petition as repetitious.[5] We note, however, that on March 11, 1993, we adopted a *Notice of Proposed Rule Making* in PR Docket No. 93-60,[6] proposing modification of the co-channel protection criteria for all 800 MHz and 900 MHz systems regulated under 47 C.F.R. Part 90, Subpart S. Because Motorola's Petition contains information relevant to the disposition of PR Docket No. 93-60, we will treat the Petition as a comment to be incorporated into the record of PR Docket No. 93-60.

3. Accordingly, pursuant to the authority contained in 47 C.F.R. § 1.429(i), IT IS ORDERED that the Petition for Partial Further Reconsideration IS DISMISSED as repetitious.

4. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

5. For further information concerning this *Order*, contact Steve Sharkey, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443, or Freda Lippert Thyden, Land Mobile and Microwave Division, Private Radio Bureau, (202) 632-7125.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] *Memorandum Opinion and Order*, PR Docket No. 90-34, 7 FCC Rcd 6069 (1992).
[2] *Report and Order*, PR Docket No. 90-34, 6 FCC Rcd 4929 (1991).
[3] *See* 47 C.F.R. § 90.621(b) identifying the co-channel distance separation criteria for systems operating on SMRS Category frequencies.
[4] *MO&O* at 6070.
[5] For other Commission decisions dismissing petitions for reconsideration as repetitious, *See* Order on Further Reconsideration, CC Docket No. 85-166, 6 FCC Rcd 76 (1991), and Order, MM Docket No. 87-121, 7 FCC Rcd 2954 (1992).
[6] 8 FCC Rcd 2454 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-465
MM Docket No. 89-488

In the Matter of

Amendment of Section 73.202(b),	RM-6905
Table of Allotments,	RM-6932
FM Broadcast Stations.	RM-7266
(Chenango Bridge, Norwich, and	RM-7267
Cincinnatus, New York)	

ERRATUM

Released: October 27, 1993

By the Assistant Chief, Allocations Branch:

1. On September 7, 1993, the Commission released a *Report and Order, 8 FCC Rcd 6621 (1993) in the above-captioned proceeding. The caption of that Report and Order* inadvertently listed RM-7217 instead of RM-7267. Accordingly, we amend the caption of the *Report and Order* to insert RM-7267 and remove RM-7217.

2. The *Report and Order* also inadvertently failed to dismiss Northeastern's counterproposal for Channel 238A at Chenango Bridge. While it is clear from the text of the *Report and Order* that Northeastern's counterproposal was denied, in order to avoid any confusion, we add the following ordering clause:

IT IS FURTHER ORDERED, That the counterproposal of Northeastern Broadcasting, Inc. (RM-7267), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-181

In the Matter of

Amendment of Section 73.202(b),	RM-7696
Table of Allotments,	RM-7817
FM Broadcast Stations.	
(Ashland, California, Rolla	
and Monroe City, Missouri)	

ORDER TO SHOW CAUSE

Adopted: September 30, 1993; Released: October 27, 1993

Comment Date: December 20, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission issued a *Notice of Proposed Rule Making*, 6 FCC Rcd 3727 (1991), proposing the substitution of FM Channel 232C2 for Channel 232A at California, Missouri, and modification of the license for Station KZMO-FM to specify operation on the new channel. The *Notice* was issued in response to a petition filed by Town and Country Communications, Inc. ("Town and Country"). To accommodate the upgrade at California, Town and Country also requested the substitution of Channel 292A for Channel 232A at Rolla, Missouri, and modification of the license for Station KQMX(FM) accordingly. Sobocomo Radio, Inc. ("Sobocomo") filed a counterproposal in response to the *Notice* proposing the substitution of Channel 291C1 for Channel 291C2 at Ashland, Missouri, and modification of its construction permit to specify operation on the higher class channel. To accommodate the upgrade at Ashland, Sobocomo requested the substitution of Channel 298A for Channel 292A at Monroe City, Missouri, and modification of the license for Station KDAM's license to specify operation on Channel 298A. On October 16, 1992, Town & Country, Progressive Broadcasting Company of Missouri ("Progressive") and Sobocomo filed supplemental comments and a settlement agreement in an attempt to resolve the conflicts in this proceeding. The settlement agreement proposed the substitution of Channel 232C2 for Channel 232A at California, Missouri, substitution of Channel 292A for Channel 232A at Rolla, Missouri, at a new site, substitution of Channel 298A for Channel 292A at Monroe City, Missouri, and substitution of Channel 291C1 for Channel 291C2 at Ashland, Missouri, at a new site. It also proposed a new site for vacant Channel 290A at Wheeling, Missouri, to accommodate the substitution at Ashland.

2. In the *Report and Order*, we adopted the California proposal based on a comparison of the populations within the predicted gain areas.[1] We did not accept the settlement agreement. *See Report and Order*, 8 FCC Rcd 1799 (1993). As noted in the *Report and Order*, although the settlement agreement would have resolved existing short spacings in the proceeding, the introduction of the community of Wheeling, which was not part of the initial proceeding or counterproposal, constituted an untimely filed counterproposal and therefore neither it nor the settlement agreement could be accepted as filed. *See* Section 1.420(d) of the Commission's Rules and the *Appendix* to the *Notice*.

3. Sobocomo filed a petition for partial reconsideration arguing that the Commission's staff should not have denied the counterproposal and the settlement agreement.[2] The petition for partial reconsideration proposes a resolution to the conflicts in this proceeding using channels and sites which do not affect the allotment of Channel 232C2 at California granted in the *Report and Order*, nor the Wheeling allotment.

4. As noted above, the counterproposal and settlement agreement filed in this proceeding proposed the substitution of Channel 298A for Channel 292A at Monroe City, Missouri, to accommodate the substitution of Channel 291C1 for Channel 291C2 at Ashland, Missouri. Town and Country has selected a site for Channel 291C1 at Ashland that is fully spaced to the allotment site for Channel 290A at Wheeling. This allows us to reconsider the settlement agreement. Also, an application has been filed for Channel 290A at Wheeling, Missouri, on a first-come, first-serve basis that does not conflict with Channel 291C1 at Ashland. No further consideration will be given to Wheeling in this proceeding.

5. In order to proceed with our analysis of Town and Country's petition for reconsideration, it is necessary to issue an *Order to Show Cause* to Station KDAM, Channel 292A, Monroe City, Missouri, why its license should not be modified to specify operation on Channel 298A, as follows:

	Channel No.	
Community	Present	Proposed
Monroe City, Missouri	292A	298A

The Monroe City substitution can be made at the licensed site of Station KDAM.[3] Town and Country has expressed its willingness to reimburse Station KDAM for the reasonable costs it would incur in changing to Channel 298A, pursuant to the Commission's guidelines in *Circleville, Ohio*, 8 FCC 2d 159 (1967).

6. The Commission has made a preliminary determination that the public interest may be advanced by the substitution of Channel 298A for Channel 292A at Monroe City to accommodate the substitution of Channel 291C1 for Channel 291C2 at Ashland, Missouri, in the event that Town and Country's petition for reconsideration is

[1] Our analysis indicated that the California proposal would result in service to an additional 129,178 persons in a 2,591 square mile area, whereas the Ashland proposal would result in service to an additional 120,616 persons in a 3,063 square mile area.

[2] Public Notice of the petition for reconsideration was given on May 27, 1993, Report No. 1943.

[3] The coordinates for Channel 298A at Monroe City are 39-35-12 and 91-47-57.

granted.[4] Progressive, licensee of Station KQMX(FM), has agreed to the substitution of Channel 248A for Channel 292A to accommodate the upgrade at Ashland.[5] Therefore, there is no need to issue an *Order to Show Cause* to Progressive. Town and Country has stated that it will reimburse Progressive for its reasonable costs in changing channels. A final determination regarding these amendments to the Table must await the outcome of this *Order to Show Cause* concerning the license modification of Station KDAM, Monroe City, Missouri, as discussed herein. Although this Order provides Station KDAM an opportunity to object to the ordered channel change, it does not afford additional opportunity to comment on the merits of the conflicting proposals or the petition for reconsideration, or for the acceptance of additional counterproposals.

7. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Monroe City Broadcasting, Inc., licensee of Station KDAM, Monroe City, Missouri, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 298A as proposed herein instead of the present Channel 292A.

8. Pursuant to Section 1.87 of the Commission's Rules, Monroe City Broadcasting, Inc., may not later than **December 20, 1993,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Monroe City Broadcasting, Inc., to furnish additional information. If Monroe City Broadcasting, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Monroe City Broadcasting, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send, by Certified Mail, Return Receipt Requested, a copy of this *Order to Show Cause* to:

Monroe City Broadcasting, Inc.
P.O. Box 38
Monroe City, Missouri 63456

B-D, Inc.
Station KFBD-FM
Box 58
Linn Creek, Missouri 65052

Sunburst II, Inc.
Station KGBX-FM
840 South Glenstone
Springfield, Missouri 65802

10. A copy of any comments filed by Monroe City Broadcasting, Inc. in this proceeding should be served on the following:

David G. O Neil
Haley, Bader & Potts
4350 North Fairfax Drive, Suite 900
Arlington, Virginia 22203-1633
(counsel for Sobocomo Radio, Inc.)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] The coordinates for Channel 291C1 at Ashland are 38-43-39 and 92-40-39. Channel 291C1 at this site is currently short spaced to Channel 290C2, Bolivar, Missouri. However, Channel 290C2 was reallotted from Bolivar to Nixa, Missouri, in MM Docket 90-485. *See* 6 FCC Rcd 3648 (1991).

[5] The coordinates for Channel 248A at Rolla are 37-56-40 and 91-47-30. Although Channel 248A is short spaced to Channel 249A, Station KFBD-FM, Waynesville, Misouri, the *Report and Order* in MM Docket 91-229 substituted Channel 250A for Channel 249A at Waynesville, which removes the conflict. *See* 7 FCC Rcd 1036 (1992). Channel 292A was substituted for Channel 232A at Rolla in this same proceeding to accommodate Channel 232C2 at California, Missouri.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-200

In the Matter of

Amendment of Section 73.202(b), RM-8254
Table of Allotments,
FM Broadcast Stations.
(Micco, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1993; Released: October 27, 1993

By the Assistant Chief, Allocations Branch:

1. At the request of Micco Broadcasting ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4859 (1993), proposing the allotment of Channel 240C3 to Micco, Florida, as that community's first local aural transmission service. Petitioner filed supporting comments. No other comments were filed.

2. In the *Notice*, petitioner was requested to furnish sufficient information to support a finding that Micco is a community for allotment purposes since it is not listed in the U.S. Census. Petitioner was requested to provide specific information as to the social, economic, cultural or governmental indicia to determine whether Micco is a community for allotment purposes. In response petitioner states that Micco has a Homeowners Association, a Moose Lodge, a library, a park which includes recreational facilities such as a swimming lake, ballfield and basketball courts, volunteer fire department and paramedic squad. Petitioner also states that the residents are served by a volunteer fire department and paramedic squad and several marinas. Petitioner states that there are numerous businesses, beauty shops, restaurants, gas stations, boating facilities, a car repair shop and an accounting and income tax service. In addition there is a Baptist, Lutheran and Catholic church located in Micco. Further, petitioner states that Micco is served by the Brevard County Commissioners.

3. Based upon the record before us, we do not believe that Micco is a "community" for allotment purposes. Micco is not listed in the U.S. Census, although the 1993 Rand McNally Commercial Atlas estimates its population as 900. However, mere geographical location is not sufficient to establish "community" status. *See Hannibal, Ohio*, 6 FCC Rcd 2144 (1991); *Crossville and Hilham, Tennessee*, 6 FCC Rcd 6636 (1991) and *Hannahs Mill and Milledgeville, Georgia*, 7 FCC Rcd 3944 (1992) and cases cited therein. Petitioner has not shown that the organizations it cites are intended to serve the needs of Micco, as opposed to the nearby areas of Barefoot Bay and Little Hollywood, Florida, which are all unincorporated areas. Furthermore, petitioner has failed specifically to identify any businesses, political or commercial organizations which identify themselves with Micco. In the past, the Commission has rejected claims of community status where a connection has not been shown between political, social and commercial organizations and the community in question. It also appears that there is no local government in Micco. *See Stock Island, Florida*, 8 FCC Rcd 343 (1993); *Gretna, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633(1991) and cases cited therein. We believe that the record in this proceeding is insufficient to find that Micco is a community for allotment purposes. Therefore, we will not allot Channel 240C3 to Micco, Florida.

4. IT IS FURTHER ORDERED, That the request of Micco Broadcasting for the allotment of Channel 240C3 to Micco, Florida (RM-8254) IS DENIED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-160

In the Matter of

Amendment of Section 73.202(b), RM-8238
Table of Allotments,
FM Broadcast Stations.
(Window Rock, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1993; Released: October 27, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 4078 (1993), issued in response to a petition for rule making filed by Western Indian Ministries, Inc. ("petitioner"), permittee of Station KHAC-FM, Channel 276A, Window Rock, Arizona, proposing the substitution of Channel 274C1 for Channel 276A and modification of its authorization accordingly to specify the higher powered channel. Supporting comments were filed on behalf of the petitioner reiterating its intention to apply for Channel 274C1 if allotted to Window Rock, as requested.[1] No other comments were received.

Engineering Analysis

2. As stated in the *Notice*, Channel 274C1 may be allotted to Window Rock consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site, located 10.9 kilometers (6.8 miles) southeast of the community at coordinates 35-35-00 and 109-02-00, to avoid a short spacing to the construction permit issued to Station KMYI(FM), Channel 275C, Kirtland, New Mexico, at coordinates 37-21-47 and 108-09-02. However, as the use of petitioner's specified site does not eliminate a short-spacing to the allotment coordinates for Channel 275C at Kirtland at 37-01-45 and 108-10-36, the issuance of a license for Station KHAC-FM on Channel 274C1 at Window Rock may be withheld until Station KMYI(FM) is granted a license at the transmitter site specified in its construction permit (File No. BPH-910226MB).[2]

3. We believe the public interest would be served by substituting Channel 274C1 for Channel 276A at Window Rock since it could provide the community with an expanded coverage area FM service. Therefore, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the authorization of Western Indian Ministries, Inc. for Station KHAC-FM, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Window Rock, Arizona, as follows:

City	Channel No.
Window Rock, Arizona	241C1, 274C1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Western Indian Ministries, Inc. for Station KHAC-FM, Window Rock, Arizona (BPH-910610ME), IS MODIFIED to specify operation on Channel 274C1 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Western Indian Ministries, Inc., permittee of Station KHAC-FM, is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Window Rock, Arizona.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to the permittee of Statin KMYI(FM), as follows: Jeff and Joella Thomas, 3207 Espacio Street, Farmington, New Mexico 87401.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

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[1] As stated in the *Notice*, petitioner's request, although signed, failed to include an affidavit verifying statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has complied accordingly.

[2] The permittee of Station KMYI(FM) will be served with a copy of this *Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-246

In the Matter of

Amendment of Section 73.606(b) RM-8091
Table of Allotments,
TV Broadcast Stations.
(Ridgecrest, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1993; Released: October 27, 1993

By the Assistant Chief, Allocations Branch:

1. At the request of Valley Public Television, Inc. ("petitioner"), licensee of noncommercial educational television Station KVPT, Channel *18, Fresno, California, the Commission has before it a *Notice of Proposed Rule Making*, 7 FCC Rcd 7164 (1992), requesting the substitution of Channel *41 for Channel *25 at Ridgecrest, or alternatively, the placement of a site restriction on Channel *25 at Ridgecrest to accommodate petitioner's application site for a new noncommercial educational television station on Channel *39 at Bakersfield, California (File No. BPET-900904KF).[1] Petitioner filed comments in support of the proposal affirming its intention to apply for Channel 39 at Bakersfield, if the request in the instant docket was granted. Opposing comments were filed by Community Television of Southern California, ("CTSC"), licensee on noncommercial educational television Station KCET, Channel *28, Los Angeles, California. Reply comments were filed by petitioner.

2. As indicated in the *Notice*, Channel *25 at Ridgecrest, California, an isolated community in the desert area of eastern California, was short-spaced to petitioner's proposed reference coordinates for its Bakersfield, California, application site for Channel *39. Petitioner contended that the substitution of Channel *41 in lieu of Channel *25 to Ridgecrest would eliminate the short-spacing. Petitioner further contended that the allotment of Channel *41 to Ridgecrest would maximize the efficient use of Channel *39 in Bakersfield by permitting operation of the channel from petitioner's preferred site, releasing Channel *25 for use in another community and permitting the retention of an educational television channel allotment at Ridgecrest. Petitioner alleged that Channel *25 at Ridgecrest cannot currently be used because of the freeze instituted in light of the advanced television proceeding.[2] Petitioner pointed out that there had been no interest shown in Channel *25 since its allotment 25 years ago. Petitioner further stated that the allotment of Channel *41 to Ridgecrest posed no technical problems and would have no adverse effect on any other allotments or operating stations. Alternatively, petitioner maintained that Channel *25 could be retained at Ridgecrest with a site restriction that would clear petitioner's application site.

3. On June 18, 1993, the petitioner and CTSC filed a Joint Petition for Approval of Settlement regarding their applications for noncommercial educational television Channel *39 at Bakersfield, California in MM Docket No. 93-93. A joint supplement to the settlement agreement was also filed on July 15, 1993. The settlement agreement provided for, *inter alia*, (a) the dismissal of both applications, with prejudice; (b) the dismissal of petitioner's Petition for Reconsideration of the grant of CTSC's application (File No. BPTT-910503AY) for a new television translator station on Channel 67 Bakersfield, California; (c) the provision of noncommercial television service to Bakersfield by both parties on their respective translator facilities; and (d) various ancillary agreements between petitioner and CTSC, effective for a period of five years, defining the areas in which each party may operate translator or low power television facilities and limiting the retransmission of their respective signals. The agreement also prohibited the parties from applying for a full service station to operate on Channel *39 in Bakersfield for five years unless an independent third party files for such facility first. The settlement agreement was approved and granted, as amended, by the Administrative Law Judge. Accordingly, the parties' applications (File Nos. BPET-881012KE and BPET-900904KE) were dismissed, with prejudice. *See Memorandum Opinion and Order*, FCC 93M-480, released July 20, 1993. Therefore, in view of the action taken in Docket No. 93-93, it is not necessary to entertain petitioner's request in the instant docket. Accordingly, we will dismiss petitioner's proposal.[3]

4. IT IS ORDERED, That the Petition For Rule Making and Petition for Reconsideration filed by Valley Public Television, Inc., are moot and ARE DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

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[1] Petitioner's petition for rule making was initially dismissed by letter on the grounds that the Ridgecrest channel substitution had been proposed in the context of MM Docket 85-390. While the proposed substitution at Ridgecrest was not adopted, the proceeding remained pending due to the filing of an application for review. *See* Letter from Chief, Allocations Branch, to counsel for Valley (May 1, 1991). *See also Report and Order* in MM Docket No. 85-390, 2 FCC Rcd 5882 (1987). Petitioner filed a petition for reconsideration of the letter dismissal and again requested the initiation of a rule making proceeding. While petitioner's petition was pending, the Commission resolved MM Docket 85-390. *See Memorandum Opinion and Order (Ventura, California)*, MM Docket No. 85-251, 7 FCC Rcd 5601 (1992). In view of the above, petitioner's substitution request at Ridgecrest was subsequently entertained and a *Notice* was issued. We will dismiss petitioner's petition for reconsideration as moot at the termination of this proceeding.

[2] *See Advanced Television Systems and Their Impact on the Existing Television Service* in MM Docket 87-268, 52 Fed. Reg. 28346, published July 29, 1987.

[3] Since petitioner's proposal is now moot, responsive pleadings thereto will not be discussed in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-145

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Limon, Colorado) — RM-8235

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 8, 1993; Released: October 27, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 3706 (1993), issued in response to a petition filed by Anastasis Broadcasting Co. ("petitioner") proposing the allotment of Channel 276C2 to Limon, Colorado, as that community's first local FM service. Petitioner filed comments in response to the *Notice*.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 276C2 to Limon since it could provide a first local FM service to the community.

Technical Statement

3. Channel 276C2 can be allotted to Limon in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without a site restriction, at coordinates 39-15-50 and 103-41-30.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Limon, Colorado	276C2

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 276C2 at Limon, Colorado, will open on **December 14, 1993,** and close on **January 13, 1994**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, although petitioner's request was signed and an address provided, it failed to verify the statements contained in the petition and was requested to do so in its comments. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. Petitioner did not correct the verification omission in its comments. However, as Channel 276C2 can be allotted to Limon without prejudice to any other pending request or allotment proposal, we do not believe the petitioner's failure to verify its statements should result in the severe penalty of depriving Limon of its first local FM service. Nevertheless, our determination should not be interpreted as exempting parties from complying with the requirements of Section 1.52 of the Commission's Rules. In fact, had we been unable to accommodate this proposal without prejudice to any other pending request, the proposal may have been dismissed based upon the petitioner's failure to abide by the requirements of Section 1.52 of the Commission's Rules initially, or to remedy the omission in response to the explicit directive contained in the *Notice*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-111

In the Matter of

Amendment of Section 73.202(b), RM-8204
Table of Allotments,
FM Broadcast Stations.
(Reedsport, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 7, 1993; Released: October 27, 1993

By the Assistant Chief, Allocations Branch:

1. At the request of Colleen E. and Rodney B. Fafara ("petitioners"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 2805 (1993), proposing the substitution of Channel 258C3 for Channel 258A at Reedsport, Oregon, and the modification of Station KRBZ's construction permit to specify operation on the higher class channel. Petitioners filed comments reiterating their intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 258C3 for Channel 258A at Reedsport, Oregon, since it could provide the community with a wide coverage area FM service and enable Station KRBZ to expand its coverage area. As proposed, we will also modify Station KRBZ's construction permit to specify operation on Channel 258C3 in lieu of its present Class A channel.

Technical Summary

3. Channel 258C3 can be allotted to Reedsport in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.5 kilometers (1.6 miles) south to accommodate petitioner's desired transmitter site.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Reedsport, Oregon	221A, 258C3

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Colleen E. and Rodney B. Fafara for Station KRBZ, IS MODIFIED to specify operation on Channel 258C3, in lieu of Channel 258A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Colleen E. and Rodney B. Fafara, permittees of Station KRBZ, are required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In the *Notice*, petitioners were advised that they had not complied with the verification requirement set forth in Section 1.52 of the Rules and thus were requested to correct the oversight in their comments. Petitioners have done so in their comments.

[2] The coordinates for Channel 258C3 at Reedsport are North Latitude 43-40-40 and West Longitude 124-06-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-501

In re Applications of

KATE F. THOMAS — File No. BPH-890424MC

TIMOTHY Z. BARBER d/b/a DOUBLE B BROADCASTING — File No. BPH-890424MD

LADY BUG BROADCASTING COMPANY, INC. — File No. BPH-890424MF

For Construction Permit for a New FM Station on Channel 281C2, Union, Mississippi

MEMORANDUM OPINION AND ORDER

Adopted: October 18, 1993; Released: October 28, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, AND GREENE.

1. In an *Initial Decision* (*I.D.*), 7 FCC Rcd 5141 (1992), Administrative Law Judge Arthur I. Steinberg (ALJ) granted the application of Lady Bug Broadcasting Company, Inc. (Lady Bug) for a construction permit for a new FM station at Union, Mississippi. Before the Review Board are exceptions filed by the three remaining applicants[1] and replies filed by Timothy Z. Barber d/b/a Double B Broadcasting (Barber) and Lady Bug.[2] Because these filings raise substantial and material questions concerning Lady Bug's candor before the Commission, we remand this proceeding to the ALJ for further hearing and the preparation of a Supplemental Initial Decision.

2. *Background.* After ruling that Thomas violated the Commission's *ex parte* rules, but that such misconduct was not disqualifying, the ALJ resolved outstanding financial qualifications issues favorably to Lady Bug but adversely to Thomas. *I.D.*, ¶ ¶ 111-24. He then analyzed the remaining applicants under the standard comparative issue finding that, although both Barber and Lady Bug receive 100% credit for their proposals to integrate their principals into the management of their facilities on a full-time basis, Lady Bug's proposal is preferred due to its superior qualitative enhancements for past residence in the service area and broadcast experience. *Id.* at ¶ ¶ 125, .128-30, 141-44, *citing Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). In exceptions to the *I.D.*, Barber maintains that the ALJ erred in finding Lady Bug basically qualified to be a Commission licensee in light of outstanding questions concerning sole shareholder Dorothy A. Torgerson's candor arising out of contradictory statements regarding her participation in her son's broadcast stations at the time of the application's filing. Barber Exceptions at 4-13. These questions were first raised in a prehearing motion to enlarge issues filed by former party Mary L. Hooper and Carolyn B. Tinsley (Hooper-Tinsley), and denied by the ALJ by *Memorandum Opinion and Order*, FCC 91M-2467, released August 9, 1991.

3. Barber recounts that on April 24, 1989, Lady Bug reported in Exhibit B to its application:

> Dorothy A. Torgerson's son, Larry D. Torgerson owns 100% of Torgerson Broadcasting Company, Inc., licensee of WMDN-AM, Meridian, Mississippi and 51% of Marion Broadcasting Company, Inc., licensee of WQIC(FM), Marion, MS.
>
> *Mrs. Torgerson has no involvement in the daily operations of these stations.* She is not an employee of either station. If Mrs. Torgerson is awarded the construction permit for the allocation of channel 281C2 at Union, Mississippi, there will be no association between the properties owned by Larry D. Torgerson and herself.

Hooper-Tinsley Exh. 7 (emphasis added, capitalization omitted).[3] Lady Bug further volunteered that Larry Torgerson would divest his interests in the stations, which are proximate to the proposed Union facility, prior to Lady Bug's commencement of broadcast operations. Lady Bug Application, Exh. C.

4. During the discovery phase of this proceeding, almost two years after the filing of the applications, Lady Bug exchanged a resume prepared by Dorothy Torgerson in which she described the following broadcast experience:

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[1] We earlier dismissed Mary L. Hooper and Carolyn B. Tinsley from this proceeding for failure to prosecute. *Kate F. Thomas*, 8 FCC Rcd 632 (Rev. Bd. 1993).

[2] Contrary to the rules governing Board filings, Lady Bug submitted separate reply briefs to each of its opponent's exceptions. *See* 47 CFR § 1.277(c); *Filing Briefs Before the Review Board*, 67 FCC 2d 79 (Rev. Bd. 1977) ("multiple reply pleadings . . . are not permitted"). Considered together, Lady Bug's pleadings otherwise substantially comply with the provisions of § 1.277 including the 25-page limitation. While we do not condone the filing of multiple replies, we will not strike either pleading in this instance, but admonish counsel to more carefully heed our procedural requirements in future proceedings.

[3] Lady Bug's application also provided:

> There is presently no financial obligations of Mrs. Torgerson toward the properties owned by Larry D. Torgerson, and if Lady Bug Broadcasting Company is the successful applicant, all financial matters and control will in no way be interrelated.

Hooper-Tinsley Exh. 7 (capitalization omitted).

9/14/68-2/2/87 -	Member, Board of Directors, Torgerson Broadcasting Co., Inc. Secretary/Treasurer, WQIC-AM Business Manager, WQIC-AM 49% stock holder 9/14/68-2/2/87 Torgerson Broadcasting Co., Inc.
2/2/87 -	WQIC-AM sold
2/3/87-2/8/90 -	*Business Manager, WMDN-AM (formerly WQIC-AM)*
3/15/87-2/8/90 -	*Business Manager, WQIC-FM*
2/8/90 -	WMDN-AM, WQIC-FM sold to Major Broadcasting. Re-signed position.

> Duties as Business Manager at all stations included billing and accounts receivable, ordering supplies, paying all station bills, posting and collecting accounts receivable, payrolls for all stations, sales. In addition, wrote, produced and served as talent on numerous announcements, both commercial and public service. Handled public service scheduling for church groups and local civic organizations.

Hooper-Tinsley Exh. 5 (emphasis added). The highlighted text appears to directly contradict information contained in Lady Bug's 1989 application that Dorothy Torgerson had no current involvement in her son's stations. Ms. Torgerson confirmed the accuracy of her resume at her April 24, 1991 deposition.[4] Hooper-Tinsley Motion to Enlarge at 2-3 & Exh. C.

5. In Lady Bug's direct written case exhibits exchanged on May 24, 1991, Torgerson retreated from her resume's representations and claimed only the following broadcast experience:[5]

> From September 14, 1968, to February 2, 1987, Dorothy Torgerson served as the Business Manager of WQIC-AM, Meridian, Mississippi. On February 4, 1969, a Certificate of Incorporation was filed for Torgerson Broadcasting Company, Inc., showing Dorothy Torgerson as a Director of the Corporation. She was named Secretary/Treasurer on February 21, 1969, and held that position until February 2, 1987. On June 11, 1976, Dorothy Torgerson obtained 49% ownership interest in Station WQIC-AM.

Lady Bug Exh. 2 (revised) at 2. Omitted from the exhibit is Torgerson's formerly alleged tenure as business manager of stations WMDN-AM (formerly WQIC-AM) from February, 1987 to February, 1990 and of WQIC-FM from March, 1987 to February, 1990.

6. *Exceptions.* Barber asserts that Lady Bug's differing accounts of Dorothy Torgerson's involvement in her son's stations reveal a disqualifying misrepresentation or a lack of candor. Barber observes that two "critical" circumstances changed during the two years between the filing of Lady Bug's application and the exchange of Ms. Torgerson's resume. First, Larry Torgerson sold his radio station interests, thereby extinguishing perceived possible diversification, duopoly, and/or cross-interest complications to Lady Bug's application. Second, the Union parties submitted their integration proposals revealing their intentions to claim 100% integration credit and substantial comparative enhancements to integration. Barber Exceptions at 4-5. Barber theorizes that, whereas it was initially advantageous for Lady Bug to portray Ms. Torgerson's relationship with her son's stations as minimal or non-existent, after designation for hearing when the risks attendant with the involvement lessened but the competition for the Union facility intensified, Lady Bug found that its interests would be better served by altering its strategy to maximize its comparative attributes -- specifically Dorothy Torgerson's broadcast experience -- so Lady Bug therefore emphasized her activities with WMDN-AM and WQIC-FM. Thus, Ms. Torgerson's prior claim of "no involvement" in the Meridian stations was suddenly elevated to her serving as their "Business Manager," where she performed "billing and accounts receivable, ordering supplies, paying all station bills, posting and collecting accounts receivable, payrolls for all stations, sales . . . wrote, produced and served as talent on numerous announcements . . . [and] [h]andled public service scheduling. . . ."[6] *Id.;* Hooper-Tinsley Exh. 5.

7. Lady Bug responds that a misrepresentation/lack of candor issue does not lie because there was no misrepresentation in fact, nor have the movants established any intent to deceive on the part of Lady Bug or Dorothy Torgerson. Lady Bug downplays Ms. Torgerson's post-filing involvement with her son's stations explaining that her efforts there were voluntary and that she gave herself the title of business manager. Lady Bug Reply to Barber at 5-6. It states that the application exhibit at issue was drafted by a consultant, based on Ms. Torgerson's response to his

---

[4] To wit:

> Q. Did you prepare that document?
>
> A. Yes.
>
> Q. Is that true and correct information?
>
> A. It's true to a point.

Hooper-Tinsley Motion to Enlarge at Exh. C (Torgerson Depo. Tr. 5).

[5] Lady Bug also generally claimed a comparative enhancement for Ms. Torgerson's broadcast experience in its integration and diversification statement filed December 20, 1990.

[6] Barber further asserts that Lady Bug's application additionally misrepresented the nature of Dorothy Torgerson's continuing *financial* involvement with WMDN-AM. Barber Exceptions at 6. While conceding that Lady Bug was technically correct in relating that Ms. Torgerson had no financial obligation "*toward*" her son's stations, Barber maintains that she did then possess a financial interest *in* the AM station. When she and her husband sold the station to their son in 1987, they financed the entire amount of the sale. At the time Lady Bug filed its instant application, Larry Torgerson was making interest-only payments to his parents and he continued to owe his mother 49% of the purchase price (the remaining 51% being owed to Stanleigh Torgerson). *Id.* at 6-7. Dorothy and Stanleigh Torgerson also owned the real property utilized by WMDN-AM during their son's tenure as owner.

query as to whether she was on her son's payroll. The application exhibit that resulted was thus the product of a "misunderstanding" and was not "untruthful." *Id.* at 6-7. Lady Bug alternatively maintains that the initial "no involvement" representation is consistent with Torgerson's later claim of serving as business manager, and submits that:

> the primary definition of the word "involved" denotes a significant participation, one that could clearly be intended by Dorothy Torgerson not [to] apply to her volunteer work, a view bolstered by the immediate juxtaposition of the statement that "She is not an employee of either station" which was meant to explain the previous sentence.

Id. Finally, Lady Bug maintains that it had no motive to hide Ms. Torgerson's involvement in the stations, since her son had volunteered to divest them in any event. *Id.* at 7-8.

8. The ALJ agreed with Lady Bug and declined to add the requested misrepresentation issue. *Memorandum Opinion and Order*, FCC 91M-2467, released August 9, 1991. He explained (*id.* at 2, footnote omitted):

> H/T [Hooper-Tinsley] has not established any such motive or intent [to deceive] on the part of Lady Bug. Indeed, H/T's attempt to attribute such motive to Mrs. Torgerson must fail because it is based on nothing more than speculation. *Folkways Broadcasting Co., Inc.*, 33 FCC 2d 806, 811 (Rev. Bd. 1972). Moreover, Mrs. Torgerson has not concealed her role in her son's AM station. On the contrary, she supplied a resume outlining that role and she testified fully and candidly on that subject, both at her deposition and at the hearing. Finally, it appears that the language in question which was contained in the Lady Bug application was based on a misunderstanding, and not upon any intent to deceive.

9. *Discussion.* "[T]he Commission's demand for absolute candor is itself all but *absolute*." *Emision de Radio Balmaseda, Inc.*, 7 FCC Rcd 3852, 3858 (Rev. Bd. 1992), *rev. denied*, 8 FCC Rcd 4335 (1993), *citing Richardson Broadcast Group*, 7 FCC Rcd 1583 (1992).[7] Indeed, even "immaterial and useless deceptions," as well as substantial and material ones, are potentially disqualifying as they may evidence an intent or willingness to deceive the Commission. *Character Policy Statement*, 102 FCC 2d 1179, 1210 n.77 (1986), *quoting FCC v. WOKO*, 329 U.S. 223, 227 (1946). Moreover, "[t]ruthfulness and full candor are as much expected in discovery as they are with respect to submissions to the Commission itself." *Edwin A. Bernstein*, 6 FCC Rcd 6841, 6844 n.6 (Rev. Bd. 1991); *see also Capitol City Broadcasting Co.*, 8 FCC Rcd 1726, 1735 n.31 (Rev. Bd. 1993).

10. Recently, the Commission and the Board have had occasion to specify misrepresentation and lack of candor issues in proceedings where applicants' representations of a principal's past broadcast experience were called into question by the surfacing of facially contradictory facts. In *Breeze Broadcasting Co., Ltd.*, 8 FCC Rcd 1835, 1839-40 (Rev. Bd. 1993), for example, the Board remanded a proceeding for further hearing to determine whether a principal testified inconsistently about her role at a broadcast station in an effort to inflate her enhancement credit for past broadcast experience. Similarly, in *Frank Digesu, Sr.*, 7 FCC Rcd 5459 (1992), the Commission remanded to the ALJ a proceeding where questions were raised as to whether a principal had worked at a broadcast station on a full-time basis as claimed and in the capacity she represented. *See also Raymond J. and Jean-Marie Strong*, 6 FCC Rcd 5321 (Rev. Bd. 1991) (misrepresentation issue added to test applicant's claim of recent employment at family-owned radio station which had just entered into an asset-purchase agreement);[8] *cf. WCVQ, Inc.*, 5 FCC Rcd 3824 (1990) (case remanded to test applicant's claim of enhancement credit for past broadcast experience in light of rebuttal evidence improperly rejected by ALJ).

11. Similar concerns have been raised and remain outstanding in the instant proceeding. After initially reporting *no involvement* in her son's stations, Dorothy Torgerson stated in discovery on the standard comparative issue that she was the stations' business manager with a plethora of self-described duties at the precise time of her formerly alleged "no involvement," thereby buttressing her enhancement for broadcast experience. Lady Bug later backpedaled, stating that she was not actually employed by the stations and that she had awarded herself the title of business manager. Lady Bug Reply to Barber at 6. On the one hand, Lady Bug blames its consultant for writing the exhibit, chalking it up to a simple misunderstanding (and not addressing the fact that Ms. Torgerson herself purportedly reviewed and executed the application). On the other hand, Lady Bug maintains that the representations in the application and resume are not inconsistent. These shifting explanations, far from clearing up any doubts, only serve to heighten our concern that Lady Bug may have engaged in misrepresentation or lack of candor before the Commission in a clumsy effort either to inflate its comparative credentials, to diminish the appearance of its continuing connection with local family-owned broadcast facilities, or to attempt to extricate itself from the tangle of its own responses. In light of the patent inconsistencies in Lady Bug's

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[7] *Recon. dismissed*, FCC 921-043, released May 22, 1992, *recon. denied sub nom. Elizabeth M. Younts*, 8 FCC Rcd 1714, *aff'd by judgment*, 995 F.2d 306 (D.C. Cir. 1993).

[8] Lady Bug argues that *Raymond J. and Jean-Marie Strong*, 6 FCC Rcd 5321 (Rev. Bd. 1991):

> hardly compares to LBC's situation in which it is clear that Dorothy Torgerson was not a paid employee of her son's station and her statement regarding "involvement" is not "flatly false." Moreover, Torgerson herself released the resume prepared by her for her counsel in the discovery stage of this proceeding.

Lady Bug Reply to Barber at 9. To the contrary, our preliminary view of the matter is that the initial representation of "no involvement" may be false in light of Torgerson's later statements. That she herself released the document containing the contradictory statements does not dispel the questions raised by the applicant's conduct. In fact, Ms. Torgerson testified at her deposition that she did not realize that her attorney would provide copies of the resume to the other parties. Hooper-Tinsley Motion to Enlarge at Exh. C (Torgerson Depo. Tr. 5).

representations about the degree and nature of her involvement at her son's former stations, and the clear mandate of precedent, we conclude that a remand is unavoidable.[9]

12. *Notice of Apparent Liability.* The Commission's *Proposals to Reform the Commission's Comparative Hearing Process,* 6 FCC Rcd 157, 164 (1990),[10] provide:

> In any case in which the ALJ, the Review Board or the Commission enlarge the issues to inquire into allegations of such misconduct, the enlarged issues shall include notice that, after hearings on the enlarged issue and upon a finding that the alleged misconduct occurred and warrants such penalty, in addition to or in lieu of denying the application, the applicant may be liable for a forfeiture of up to the maximum statutory amount.

Lady Bug is so notified. The maximum statutory amount for broadcasters and applicants under Section 503 of the Communications Act, 47 U.S.C. § 503(b)(2), is $25,000; $250,000 in the case of violations of a continuing nature.[11] *Standards for Assessing Forfeitures,* 8 FCC Rcd 6215, 6216 n.1 (1993); *see Ellwood Beach Broadcasting, Ltd.,* 8 FCC Rcd 453, 454 n.5 (1993) (where forfeiture notice is issued in connection with addition of issues in hearing cases, preferable procedure is to give notice for an amount of up to statutory maximum).

13. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the Presiding Officer for further hearing and the preparation of a Supplemental Initial Decision on the following issues:

> (a) To determine whether Lady Bug Broadcasting Company, Inc. or its principal, Dorothy Torgerson, made misrepresentations or lacked candor in pleadings filed before the Commission or exchanged with the parties in discovery with regard to Dorothy Torgerson's involvement in Stations WMDN-AM and/or WQIC-FM;
>
> (b) To determine, in light of the evidence adduced under the foregoing issue, whether Lady Bug Broadcasting Company, Inc. possesses the requisite qualifications to be a Commission licensee.

14. IT IS FURTHER ORDERED, That the burden of proceeding SHALL BE on Timothy Z. Barber d/b/a Double B Broadcasting and the burden of proof SHALL BE on Lady Bug Broadcasting Company, Inc.

15. IT IS FURTHER ORDERED, That Lady Bug Broadcasting Company, Inc. IS NOTIFIED, pursuant to 47 CFR § 1.80(f)(1), that it may have violated 47 CFR § 1.17 (duty to submit truthful written statements and responses) and 47 CFR § 73.1015 (applicants shall not submit to the Commission any written statement containing a misrepresentation or material omission bearing on any matter within the Commission's jurisdiction), resulting in an apparent forfeiture liability of a maximum amount of $250,000.

16. IT IS FURTHER ORDERED, That the Acting Secretary of the Commission SHALL SEND a copy of this Memorandum Opinion and Order by Certified Mail-Return Receipt Requested to:

Dorothy A. Torgerson
Lady Bug Broadcasting Company, Inc.
2422 26th Street
Meridian, Mississippi 39305

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

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[9] Barber's allegations that Lady Bug misrepresented Dorothy Torgerson's financial involvement with WMDN-AM do not lend independent support for the enlargement of the hearing issues. However, the remand issues will permit this aspect to be considered by the ALJ should there prove to be an adequate basis therefor.

[10] *Recon. granted in part and denied in part,* 6 FCC Rcd 3403 (1991).

[11] The base amount of a forfeiture for misrepresentation/lack of candor is $20,000. This amount is subject to possible upward or downward adjustment under the criteria set forth in *Standards for Assessing Forfeitures,* 8 FCC Rcd 6215, 6216, 6220 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

GTE Telephone Operating Companies Revisions to Tariff F.C.C. No. 1 — Transmittal No. 828

Pacific Bell Revisions to Tariff F.C.C. No. 128 — Transmittal No. 1656

MEMORANDUM OPINION AND ORDER

Adopted: October 20, 1993; Released: October 20, 1993

By the Acting Chief, Common Carrier Bureau:

1. On September 22, 1993, the GTE Telephone Operating Companies (GTOC) filed Transmittal No. 828 to, *inter alia,* clarify the requirements of a *bona fide* request for expanded interconnection service; correct two expanded interconnection service rates for which unit cost was displayed as the monthly recurring rate; and correct certain typographical errors. These revisions are scheduled to take effect on October 22, 1993. On September 23, 1993, Pacific Bell filed Transmittal No. 1656 to add one additional telephone company central office to its expanded interconnection service after receiving a *bona fide* request. Transmittal No. 1656 is scheduled to become effective on November 7, 1993. No petitions were filed against these tariffs.

2. These transmittals raise the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Order.*[1] Accordingly, Transmittal No. 1656 and those sections of Transmittal No. 828[2] relating to GTOC's expanded interconnection service will become effective following a one-day suspension, and subject to the investigation initiated in the *Expanded Interconnection Tariff Order.* These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.[3]

3. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the pertinent revisions to GTOC's Tariff F.C.C. No. 1, Transmittal No. 828,[4] and revisions to Pacific Bell's Tariff F.C.C. No. 128, Transmittal No. 1656, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittals IS INSTITUTED.

4. IT IS FURTHER ORDERED that GTOC and Pacific Bell SHALL FILE tariff revisions reflecting the suspension no later than five days from the release date of this Order.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59. GTOC and Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. §204(a), GTOC and Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al,* CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order).*

[2] Transmittal No. 828 also provides for an automatic protection switching arrangement for AT&T Communications in Missouri. This revision, scheduled to take effect November 6, 1993, does not relate to GTOC's expanded interconnection service rates. Accordingly, this part of Transmittal No. 828 will become effective as scheduled.

[3] In an Order released July 23, 1993, the Bureau designated issues in this investigation. *See* Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Rcd 6909 (Com. Car. Bur. 1993).

[4] *See* note 1, *supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 93-253

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

NOTICE OF PROPOSED RULE MAKING

Adopted: September 23, 1993; Released: October 12, 1993

Comment Date: November 10, 1993
Reply Comment Date: November 24, 1993

By the Commission: Commissioner Barrett issuing a separate statement.

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Initial Regulatory Flexibility Analysis	

1. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (Budget Act) added a new section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-713 (Communications Act). This amendment to the Communications Act gives the Commission express authority to employ competitive bidding procedures to choose from among two or more mutually exclusive accepted applications for initial licenses. The Budget Act also requires the Commission to prescribe regulations to implement Section 309(j) within 210 days after enactment, or by March 8, 1994. Further, the Budget Act requires the Commission to commence issuing licenses and permits in the Personal Communications Service (PCS) within 270 days of its enactment, or May 7, 1994. We therefore initiate this expedited proceeding to comply with the Budget Act's requirements. We also propose initial application procedures and other requirements for PCS.[1]

SUMMARY

2. This Notice of Proposed Rule Making implements provisions of the Omnibus Budget Reconciliation Act of 1993, which give the Commission explicit authority to use competitive bidding to award licenses for use of the radio spectrum. We propose that auctions be limited to a) mutually exclusive applications, b) initial license applications (and not renewal or modification applications), and c) radio communications services that principally use their spectrum to provide service to subscribers for compensation. Based on those criteria, we propose to exclude most mass media services and services used by public safety entities, for example, from competitive bidding.

3. However, we tentatively conclude that competitive bidding should begin immediately for Personal Communications Services (PCS), some services regulated by the Private Radio and Common Carrier Bureaus such as the Specialized Mobile Radio, Interactive Video Data Service, and certain cellular radio service applications.

4. We propose a variety of ways to meet the new law's requirement that small businesses, rural telephone companies, and businesses owned by women and minorities be given an opportunity to participate in the competitive bidding process. We ask for specific comments on setting aside blocks of spectrum for these designated groups, including a proposal to set aside a 20 MHz frequency block (Block C) and a 10 MHz block (block D) in context of broadband PCS to be licensed on a Basic Trading Area (BTA) basis. For both broadband and narrowband PCS, we also propose that these designated groups be able to pay for their licenses over time, and ask how tax certificates could be used to assist the designated groups as well.

[1] Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd _____ (September 23, 1993)("PCS Report and Order"); First Report and Order in ET Docket No. 92-100 and GEN Docket No. 90-314, 58 Fed. Reg. 42681 (August 11, 1993).

5. We seek comment on alternative approaches for bidding, payment, deposits, safeguards, and bidder qualifications and eligibility. Further, we tentatively conclude that although we should have a broad menu of bidding methods, oral bidding should be the basic bidding method. We also seek comment on electronic bidding and sealed bidding. We ask for comment on the general concept of bidding for groups of licenses -- also known as combinatorial bidding -- and reach tentative conclusions for implementing group bidding for broadband PCS licenses. Under group bidding, we would accept bids both for licenses individually and for all the individual licenses in the block. Licenses would be awarded as a group if a bid for the licenses as a group exceeded the sum of the highest bids for the licenses individually. If the sum of the individual bids were greater than the highest bid for the group, licenses would be awarded individually. Further, with respect to combinatorial bidding, we seek comment on providing an additional round of sealed bidding limited to winners of the first round.

6. We ask how licenses should be offered when bidding is conducted sequentially, and propose that for PCS services, the largest markets be auctioned first. We tentatively conclude that auction winners not designated by the Budget Act as deserving preferential treatment be required to pay in a lump sum upon license grant.

7. Bidding would be limited to qualified bidders. Under our preferred option, in order to participate in an auction, bidders would be required to tender in advance to the Commission a substantial upfront payment that would also serve as either the sole or an additional financial qualification in the service subject to auction. The amount of the payment would vary with the license being auctioned, and the Commission would retain the upfront payments of auction winners even if they are later disqualified.

8. The Budget Act of 1993 requires the Commission to begin licensing PCS within 270 days of enactment, and we propose to use both oral and sealed bidding in licensing broadband PCS. Oral bidding would be used in all cases except for bids on groups of licenses. For broadband PCS, we propose to permit group bidding to award all of the 51 Major Trading Area (MTA) licenses on each of two 30 MHz spectrum blocks, thereby facilitating nationwide service.

9. We ask for comment on whether this procedure should be used to facilitate grouping of PCS licenses with BTA service areas, and ask whether the Commission should accept sealed bids for all BTA licenses on an MTA basis and conduct oral auctions sequentially for individual BTA licenses. We also seek comment on the use of this combinatorial bidding to aggregate 10 MHz PCS licenses into 20 MHz or 30 MHz blocks.

10. We propose measures to prevent unjust enrichment of parties obtaining licenses via auction as well as licenses granted by lottery. We also seek comment on performance requirements to ensure prompt delivery of service and to prevent warehousing of spectrum. Finally, we seek comment on procedures to prevent collusion among bidders.

I. OVERVIEW OF THE NEW AUCTION LAW

11. Before addressing in detail provisions of the new law, we briefly describe the law's basic policies. Generally, the new legislation requires the Commission to satisfy several conditions before we may use competitive bidding to select licensees. First, there must be mutually exclusive applications that have been accepted for filing by the Commission; second, these applications must be for an initial license or construction permit; third, the license must be for a use described in Section 309(j)(2). Section 309(j)(2)(A) provides that competitive bidding may apply to a particular use of the electromagnetic spectrum if the Commission determines that

> (A) the principal use of that spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee
>
> (i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or
>
> (ii) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate.

12. Further, under Section 309(j)(2)(B), the Commission must determine that use of a system of competitive bidding will promote the objectives described in Section 309(j)(3), which, in addition to those in Section 1 of the Act, are

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
>
> (C) recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
>
> (D) efficient and intensive use of the electromagnetic spectrum.

13. In addition, Subsection (j)(3) requires that the Commission, in identifying classes of licenses and permits to be assigned by competitive bidding, include safeguards to protect the public interest in the use of the spectrum. Under Subsection (j)(4) of the statute, the Commission, when promulgating bidding regulations, must also:

> (A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;
>
> (B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this Act, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures; and

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.

14. In making the spectrum allocation decisions and in prescribing regulations under Section 309(j)(4)(C), the Commission is not permitted to base a finding of public interest, convenience, and necessity on the expectation of Federal revenues that would result from the use of competitive bidding. *See* Section 309(j)(7). Further, in Section 309(j)(3), Congress encouraged the Commission to design multiple alternative methodologies for competitive bidding.

15. There are a number of conditions precedent and conditions subsequent to the Commission's use of competitive bidding authority. Section 309(j)(10) requires that, before we may begin to license by competitive bidding, the Secretary of Commerce must have submitted a report on the reallocation of certain governmental frequencies and that report must contain certain findings. Also, prior to using competitive bidding, the Commission must have completed the rule making required by new Section 332(c)(1)(D) on the licensing of personal communications services.

16. Under Section 309(j)(10), our authority to issue licenses using competitive bidding will terminate after two years if the Secretary of Commerce, the President, or the Commission fail to take certain actions on a timely basis. Competitive bidding authority expires on September 30, 1998 in any event.

17. Finally, the new law provides that the Commission may not issue any license or permit by lottery after the date of enactment unless the spectrum's use is not a type for which auctions are permitted (as described in Section 309(j)(2)(A)), or, the application was accepted for filing before July 26, 1993. *See* Section 6002(c) (Special Rule). Under the Budget Act, therefore, mutually exclusive applications accepted for filing after July 26, 1993 may not be granted by lottery until the Commission determines whether the applicable radio service is not subject to competitive bidding under Section 309(j)(2)(A).

II. DISCUSSION

A. General Approach to Implementing Legislation

18. We propose certain broad design criteria furthering the goals mandated by Congress in order to develop rules to implement a system of competitive bidding. First, especially given the very short time within which we are required to implement competitive bidding regulations and initiate licensing of PCS, any system that we promulgate should be simple and easy to administer. Unnecessary complexity in conception or execution is likely to cause delay and frustrate Congress's intent to speed new services to the public. Second, inasmuch as the Commission has no experience in conducting spectrum auctions, we anticipate relying heavily on the experience of other government agencies who have successfully conducted auctions. Third, we seek systems of competitive bidding and associated rules that minimize costs to applicants and the Commission.

19. Further, we hope to implement general rules and regulations for competitive bidding that could apply to a variety of services and offerings. In this regard, we propose to establish a new subpart to Part 1 of our Rules that would apply to competitive bidding generally. We see two possible ways in which we might amend our rules to accommodate the new process. First, we might propose a particular auction methodology to be applied for each service which we would auction. Second, we might propose to establish a variety of auction procedures in our rules, request comment in this proceeding as to the general appropriateness of particular types of auction procedures in various circumstances, and then choose from among the procedures as we announce individual auctions. Because as yet we have no actual experience with auctions, we think such rules should afford the Commission broad flexibility to select from among the procedures as it deems appropriate for individual services. Given that we intend to begin auctions of some services before others and in view of the limited time we have to conclude this proceeding, we tentatively conclude that the second course would be preferable. We also believe that this course would more closely comply with the Congressional directive that we "design and test multiple alternative methodologies under appropriate circumstances." See Section 309(j)(3). We might announce the auction method(s) for a particular service by Commission order, Bureau order, or Public Notice, and request comment on the appropriate means of doing so.

20. Although we propose to design general auction rules, we also propose applying these new rules to certain specific services immediately, including broadband and narrowband Personal Communications Services (PCS), all common carrier radio services, the Specialized Mobile Radio service, and the Interactive Video Data Service. We therefore seek comment not only on whether these general design criteria serve the public interest, but also on the ways in which we propose to conduct competitive bidding for those services such as PCS that we hope to license quickly.[2]

[2] We are confident that the conditions precedent to the Commission's exercise of competitive bidding authority will be satisfied and will proceed on that basis.

B. Principles for Determining Whether a License Should be Auctioned

21. Although both the legislation and the Conference Report are silent on this point, the House Report states at 254 that the Commission is expected to determine "auctionability" when a service or class of service is defined by the Commission or, if the service already exists, the Commission is to determine whether the service meets the test set forth in Section 309(j)(2). H.R. Rep. 111, 103d Cong. 1st Sess. 254 (1993) (H.R. Rep. No. 103-111). We propose to use the services as currently defined by the Commission to conduct the review contemplated by Congress, and to identify those services that we tentatively conclude should be excluded from or subject to competitive bidding. We request comment on these tentative conclusions. Before conducting a service by service review, however, we shall discuss in greater detail the general criteria that must be met before competitive bidding is possible.

1. General Requirement for Mutual Exclusivity Among Applications for Initial Licenses or Construction Permits Accepted for Filing

22. By its terms, Section 309(j) only permits auctions if mutual exclusivity exists among applications that have been accepted for filing. Therefore, if mutual exclusivity among such applications does not exist, a license is not subject to competitive bidding.[3] We propose to incorporate this standard into our rules. Congress's use in Section 309(j)(1) of the term initial license or construction permit indicates that renewal licenses or permits are to be excluded from the competitive bidding process. *See* H.R. Rep. No. 103-111 at 253. It also does not appear that Congress expected that applications to modify existing licenses would be subject to competitive bidding.[4] We propose to confirm in our rules that neither renewal nor modification applications would be subject to competitive bidding.

2. General Requirement of Subscribers

23. The next major criterion for competitive bidding is that the licensee have paying subscribers. The legislative history in H.R. Rep. No. 103-111 at 254, incorporated by reference in the Conference Report, makes clear that traditional over-the-air broadcast services would not be subject to competitive bidding (there being no subscriber fee).[5] Therefore, we propose to exclude from the competitive bidding process the following classes of licenses which provide broadcast services and request comment on our proposal:

a. Broadcast television (VHF, UHF, LPTV)

b. Broadcast radio (AM and FM)

We seek comment, however, on other mass media services that might be subject to competitive bidding (*e.g.*, Direct Broadcast Satellite)[6] and specifically request that comments address how the statutory criteria for competitive bidding may apply to such services.

3. "Private Services" Excluded

24. The term "private services" used in the legislative history refers solely to services that do not involve the receipt of compensation from subscribers. More specifically, portions of the House Report, which are incorporated by reference in the Conference Report, state that the enactment of competitive bidding authority

> should not affect the manner in which the Commission issues licenses for virtually all private services, including frequencies utilized by Public Safety Services, the Broadcast Auxiliary Service, and for subcarriers and other services where the signal is indivisible from the main channel signal.

H.R. Rep. No. 103-111 at 253. It seems clear that in using the words "private services" in this manner, Congress did not intend the same meaning that the Commission has ascribed to them in other contexts. For example, the Private Radio Bureau regulates certain private land mobile services that do involve the receipt of compensation from subscribers, which could presumably be subject to competitive bidding. On the other hand, certain services identified by Congress as "private", *e.g.*, Broadcast Auxiliary Services, have never been classified as private radio services as that term is understood and used by the Commission in its Rules.

25. It is also clear that the words "private services" are not the same as the term "private mobile service" as that term is defined in new Section 332(d)(3) as added by Section 6002 of the Budget Act. The distinction between "private mobile service" and "Commercial Mobile Service" in Section 332 turns on several criteria that are not relevant to Section 309(j), *e.g.*, whether the service is interconnected to the public switched network and provided to a substantial portion of the public. *See also Implementation of Sections 3(n) and 332 of the Communications Act-Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, adopted September 23, 1993 ("332 Rule Making"). Thus, it appears that a service could be classified as a private mobile service for purposes of Section 332 but not be deemed "private" for purposes of Section 309(j).[7] In determining which services are subject to competitive bidding, we in-

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[3] In many services regulated by the Private Radio Bureau, mutual exclusivity cannot exist because the channels are shared by numerous licensees. Thus, no license would be denied on the basis of mutual exclusivity. *See* paras. 131-146, *infra*.

[4] *See* H. R. Rep. No. 103-111 at 253; *cf.* Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987).

[5] H.R. Rep. No. 103-111 at 253-254 also notes that the fact that some television licensees may receive compensation from cable television operators as a result of the enactment of the "retransmission consent" provisions of the Cable Act should have no effect on the Commission's licensing of television stations. Similarly, the Conference Report at 481-82 makes clear that Instructional Television Fixed Service (ITFS) is not to be subject to competitive bidding even if ITFS licensees receive payments from Multichannel Multipoint Distribution Service licensees for the use of ITFS spectrum.

[6] *See* 47 C.F.R. § 100.3; See also Implementation of Section 25 of the Cable Television Consumer Protection Act of 1992, 8 FCC Rcd 1589 (1993). Commenters should note that DBS construction permits have been issued and several permittees have already received transponder assignments.

[7] With this in mind, we propose that frequencies allocated to the Broadcast Auxiliary Services under Subparts D, E, F and H of Part 74 of our Rules be exempted from competitive bidding. We also propose that subcarrier-based and similar services, such as Vertical Blanking Interval, be exempted from competitive

tend to use the term "private services" to mean services that do not involve the receipt of compensation from subscribers and, hence, are outside the scope of Section 309(j)(2)(A). We request comment on our analysis.

26. Therefore, and as described more fully below, we propose that initial applications for spectrum in the common carrier fixed services, the new Commercial Mobile Services, certain private mobile services established by Section 332, and certain other services regulated by the Private Radio Bureau generally be subject to competitive bidding. Traditional common carriers have subscribers: by definition their services are offered indifferently to the public for hire.[8] We also propose that the new category of Commercial Mobile Service providers established by and defined in Section 6002, which involves subscribers and compensation, should likewise be subject to competitive bidding.[9] By contrast, the statute seems to exclude virtually all of those services which were "private services" in the sense that they did not involve the payment of compensation to the licensee by subscribers. Therefore, we propose that initial applicants for spectrum used principally for internal uses and not for services to subscribers be exempted from competitive bidding.

27. As a result of this analysis, some of the services now regulated by the Private Radio Bureau could be subject to competitive bidding, while others would not. In some cases, entire services, classes of licensees or permittees who use their licenses for "private services" within the meaning of the Section 309(j), such as the Amateur Radio Service, which is regulated under Part 97 of our Rules, would be excluded from auctions. In other cases, certain subclasses or subservices, such as the Specialized Mobile Radio (SMR) providers, who are part of the private land mobile service, might be subject to auctions while other subclasses of private land mobile service applicants might not be. We expand further on our proposal below.

4. Intermediate Links

28. For some services the test of whether certain spectrum should be subject to competitive bidding requires further analysis. Some common carriers, for example, offer point-to-point microwave service as a common carrier offering. Such spectrum, it seems, would be subject to competitive bidding if the other criteria, such as mutual exclusivity, were met. Other common carriers utilize microwave as part of an end-to-end service offering, as when a cellular carrier transmits subscriber traffic between cell sites and its Mobile Telephone Switching Office, or a local exchange telephone company uses microwave as one means of transmitting local exchange telephone service. Similarly, cable television companies often utilize point-to-point microwave to transmit television programming to different points within or among systems although not directly to their subscribers.[10]

29. Section 309(j)(2)(A) requires, in order for there to be competitive bidding, that the subject spectrum enable subscribers "to receive communications signals" or to "transmit directly communications signals." It seems that the aforementioned examples would fall within this criterion: the microwave licenses are used as an integral part of an end-to-end service offering enabling paying subscribers either to transmit directly or receive communications signals utilizing frequencies on which the licensee is licensed to operate. We therefore propose that licenses used in services as an intermediate link in the provision of a continuous, end-to-end service to a subscriber would be subject to competitive bidding.[11] Such a result would also be administratively efficient because it would eliminate the necessity of determining the nature of the use being made of a particular license. We request comment on this proposal. In particular, commenters are requested to address the practical ramifications of this proposal on the internal operations or expansion of their existing businesses. Further, commenters should address the number of situations where mutual exclusivity could arise in this context.

5. Principal Use Requirement

30. In order for competitive bidding to apply, Section 309(j)(2) requires that the principal use of that spectrum must involve, or be reasonably likely to involve, the transmission or reception of communications signals to subscribers for compensation. There are a number of services, such as the private operational fixed service (POFS) licensed under Part 94 of the Rules, where the licensee may either provide service to itself only or may offer communication service to subscribers for compensation, or may provide service to itself as well as to subscribers.

31. Congress apparently recognized the existence of such mixed use services, for Section 309(j)(3) speaks in terms of identifying the "principal use" of spectrum.[12] It also speaks in terms of identifying classes of licenses and permits to be issued by competitive bidding.[13] Therefore, we propose to identify classes of licenses and permits to determine "principal use," rather than individual licenses that are potential candidates for competitive bidding. Although, in theory, we could examine individual applications to determine their principal use, this would be virtually unworkable because of the heavy administrative burden such determinations would place on the Commission. We seek comment on our proposal.

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bidding where the underlying service is exempt. See H.R. Rep. No. 103-111 at 253. *See also* discussion of Public Safety entities, *infra*.

[8] Section 3(h), Communications Act, 47 U.S.C. § 153(h); Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945, 959 (1975), *aff'd sub nom.* NARUC v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied* 425 U.S. 992 (1976).

[9] Commercial Mobile Service, as defined by Section 332, is a "for-profit" service and is treated as common carriage under Title II of the Act, 47 U.S.C. §§ 332(c)(1)(A) and (d)(1).

[10] Contrast such use of the spectrum for these Community Antenna Relay Services (CARS) with so-called "wireless cable" companies, which do use the airwaves to transmit programming directly to their subscribers.

[11] In this regard, as noted, the CARS would be eligible for competitive bidding inasmuch as cable television systems do have paying subscribers. Commenters should address the extent to which CARS frequencies are used for internal operations for a cable system, and whether such internal uses dictate treatment similar to that proposed, for example, for the Private Operational Fixed Service frequencies discussed at paras. 30-32, and in Section IV, *infra*.

[12] *See* 47 U.S.C. § 309(j)(3); H.R. Rep. No. 103-111 at 254 (Section 309(j)(2) determination to be made when a service or class of service is defined by Commission).

[13] *Id.*

32. In order to determine whether competitive bidding may be used, we propose that at least a majority of the use of a Commission regulated service or class of service must be for service to subscribers for compensation rather than for "private service."[14] If the principal use of a service or class of service, either by average users or by the majority of users within a service, is for "private service" (*i.e.*, services without paying subscribers), then that entire service or class of service would be exempted from competitive bidding. Our long experience in regulating these services allows us to draw some tentative conclusions as to the primary use of these service classes. We therefore propose to tentatively classify services, or in a few cases, subsets of services, for their auctionability as discussed below.[15] We request comments that would support or challenge our tentative conclusions as to the nature of these services. Thus, in the above example of the POFS, we would compare the amount of "private service " use made by POFS licensees as a class with the amount of POFS use rendered to eligible subscribers for compensation.[16] [17]

33. Alternatively, if there is any use, no matter how minimal, in which one or more licensees within a given service or classification of service uses that spectrum for the provision of service to subscribers for compensation, we ask whether that entire service or class of service should be subject to competitive bidding. Such a result could be administratively convenient but could also lead to inequities for certain classes of licensees who may not use any license they would acquire for the provision of service to subscribers for compensation. Police departments and local governments as well as private corporations, such as railroads or investor-owned utility companies using their licenses for purely internal communications purposes, for example, might have to bid against SMRs for spectrum on "contaminated" bands. We seek comment on whether this apparent difficulty might be resolved by exempting only public safety entities from competitive bidding. We also believe that this approach may lead to results that are inconsistent with Congressional intent that a service, to be subject to auctions, must be used "principally" for subscriber services.[18]

III. AUCTION DESIGN

34. In this section we discuss the design of alternative auction methods that promote the objectives specified in Section 309(j)(3) of the Act and the broad goals put forth in the introductory discussion above.[19] As a general matter and consistent with Sections 309(j)(3)(A) and (D), we seek a bidding system that awards licenses to the eligible parties that value them the most within the guidelines set by Congress. Absent market failures, the parties that value licenses the most should generally best serve the public and make rapid and efficient use of the spectrum.[20] If the auction process does not award a license to the party who values it the most, the license ultimately will be resold to that party, assuming transactions costs are low and resale is permitted.[21] But, contrary to Sections 309(j)(3)(A) and (D), the provision of service to the public may be delayed and

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[14] We could measure or estimate, based on historical experience, the extent of private or internal use by comparing the amount of information throughput for private or internal purposes, without compensation of any kind, with the amount of information throughput for which compensation of any kind is received by the service or subservice's entire class of licensees. Alternatively, we might measure (or estimate) the amount of time or the amount of spectrum that is devoted to each use. We request comment on the advantages and disadvantages of these alternatives.

[15] As discussed below with respect to General Category channels and channels obtained through intercategory sharing, however, we may determine that the public interest requires that competitive bidding not be used in some circumstances even if services might satisfy that requirement. *See* Section 309(j)(3). We also recognize that the principal use test may create incentives for applicants to structure their service offerings in order to avoid competitive bidding. We intend to scrutinize any such developments and take steps to deal with such behavior, such as reclassifying services or service categories, if and when it occurs.

[16] In our experience, the vast majority of use of the POFS is for private or internal use by the licensee or its affiliates for which no compensation of any kind is paid. We anticipate that the POFS would be excluded from competitive bidding under this analysis and request comment on our tentative conclusion.

[17] In a very few instances, the Commission has granted waivers to permit common carrier use of frequencies regulated by the Private Radio Bureau or vice versa. These waivers are sufficiently rare that we believe they will have no material impact on the classifications we propose. We request comment on our tentative conclusion.

[18] *See also* the discussion of the General Category channels in Section IV, *infra*.

[19] This section draws on a framework developed in 1984-85 at the U.S. Department of the Interior for improving the design of Federal coal lease auctions. This framework includes a comprehensive set of auction design criteria and a breakdown of the auction process into basic design elements that can be modified individually. *See* Donald J. Bieniewicz, DESIGN ELEMENTS OF A BONUS-BID AUCTION, Office of Policy Analysis, U.S. Department of the Interior, presented at the TIMS/ORSA Joint National Meeting, Washington, D.C. (April 26, 1988).

[20] We believe that appropriate safeguards generally can be designed to prevent significant market failures, while awarding licenses to the parties who value them the most. For example, government-provided financing of licenses (through special payment schedules) could mitigate the effects of undue discrimination against small businesses in private capital markets. In some cases, however, eligibility restrictions, *i.e.*, excluding parties who are potentially the highest bidders, may be an appropriate safeguard to promote economic efficiency and the statutory objectives in Section 309(j)(3). For example, the Commission may wish to limit the concentration of licenses within each geographic market to prevent abuse of market power. The fact that a monopolist in a market would be willing to pay the most for a second license does not indicate that it would best serve the public. Finally, restrictions may be an appropriate means of addressing the statutory objectives in Section 309(j)(3)(B). Of course, a policy to set aside certain licenses only for some designated group of applicants may exclude the bidders who value the licenses the most.

[21] This has been the experience in licensing cellular service by lottery. The Commission divided the U.S. and territories into 734 cellular service areas and allocated two frequency blocks, block A (non-wireline) and B (wireline, *i.e.*, limited to local telephone companies with a presence in the cellular service area). Comparative hearings were used to select among mutually exclusive applications in the top 30 markets, while lotteries were used in the remaining markets. As of March 1993, 70 percent of all cellular licenses and 85 percent of non-wireline licenses had been the subject of at least one non pro-forma transfer of control. Thus most of the current cellular licensees ended up buying their licenses at market prices.

the public would receive less revenue than if the auction initially awarded the license to the party willing to pay the most.[22]

35. Consistent with the statute, we also seek to implement an auction system that facilitates the efficient aggregation of licenses where appropriate. Combining certain licenses across spectrum and geographic areas will reduce costs and promote the provision of higher valued services. If the auction system does not provide for such aggregation, most of it will occur eventually in the aftermarket. But such aftermarket transactions are likely to be more costly, especially if there are holdouts, and service to the public may be delayed, contrary to the statutory objective. Moreover, a substantial portion of the gain from combining licenses will then be reaped by traders in the aftermarket instead of by the public. In light of the economic opportunity safeguards proposed in this notice and the Commission's existing limitations on total spectrum holdings within a market, we believe that, with appropriate safeguards, our auction process is likely to produce a level of license aggregation that will not compromise the Congressional objectives of promoting economic opportunity and competition.

A. Bidding

36. Alternative Bidding Methods. There are four basic auction methods: oral ascending bid (English), sealed bid, descending bid (Dutch) and sealed second-bid (Vickrey).[23] The oral bid and sealed bid are the most common. Combinations of these four methods, such as permitting the submission of sealed bids in oral auctions, are also possible.

37. Under oral bidding the asking price is raised until a single bidder remains. The item is awarded to the highest bidder at the bid price. Oral bidding has several advantages. First, oral bidding is likely to assign a license to the party who values it the most. Assuming bidders do not collude, the party with the highest willingness to pay would ultimately outbid all other parties in an oral auction. The price the high bidder would pay would be approximately the value placed on the item by the bidder with the second highest willingness to pay. Second, if licenses are offered individually, aggregation is likely to be easier under oral bidding than sealed bidding. Under oral bidding, a bidder willing to outbid all competitors can be assured of acquiring any group of licenses. A third advantage of oral bidding is that it may have lower private costs than sealed bidding or a Dutch auction because it does not require estimation of the value other bidders place on the item. Finally, oral bidding is likely to be perceived as fair because the process is open, and any eligible and qualified bidder who is willing to pay enough can be assured of winning.

38. A disadvantage of oral bidding is that it may be more subject to manipulation than sealed bidding when there are few bidders. The most serious form of manipulation takes place when parties get together before the auction and agree on who will win.[24] Such collusion reduces the return since the party designated to win could bid well below the value of the item without fearing that it would be outbid. To address this concern, the Commission may wish to propose rules against collusion. (*See* discussion below.)

39. A variant of the ascending bid oral auction is electronic bidding conducted in real-time. Bids would be submitted electronically by telephone or computer terminals and announced within some short time period. Minimum bid increments would be set. Bidding would end at some predetermined time or after some set period of time had lapsed since the last bid. Such a system has been proposed for auctioning Treasury securities.[25] This method could be used to conduct simultaneous ascending bid auctions, which are discussed below.[26]

40. In a sealed bid auction the high bidder would be awarded the item and pay the amount bid.[27] Sealed bidding is simple to administer and less subject to manipulation by bidders than an oral auction. For example, collusion is less likely under sealed bidding because the colluders run a higher risk of losing the auction to a firm not participating in or reneging on an agreement. A breach of agreement would not be discovered until the bidding was closed. Any retaliation against such a firm would need to either take place outside of the auction process or wait until the next auction.

41. A disadvantage of a standard sealed bid auction is that it may not award the item to the party who values it the most. In sealed bid auctions bidders would shade their bids below the maximum amount they are willing to pay in order to avoid paying more than necessary to win the auction. Generally, a bidder's objective is to make its winning bid only slightly more than the next highest bid. Since in a sealed bid auction, bidders do not know precisely how much other parties will bid, it is possible that the bidder with the highest willingness to pay may not

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[22] The delay and loss of revenue is illustrated by the Commission's experience with lotteries, which are unlikely to award licenses to the parties that value them the most. For example, lottery winners of the rural cellular licenses for Columbia County, Wisconsin, sold it for $62.3 million in 1990, 165 days after a construction permit was issued. The public received none of this revenue, except for possible tax payments.

[23] R. Preston McAfee and John McMillan, Auctions and Competitive Bidding, 25 Journal of Economic Literature 699-738 (June 1987).

[24] Marc Robinson, Collusion and the Choice of Auction, 16 Rand Journal of Economics 141 (Spring 1985).

[25] Vincent Reinhart, THEORY AND EVIDENCE ON REFORM OF THE TREASURY'S AUCTION PROCEDURE, Federal Reserve Board, Washington, D.C. (March 1992).

[26] Real time ascending bid auctions could also be conducted by other means such as open written bids. This system is commonly used in charity "silent" auctions.

[27] We seek comment on whether bidders should be permitted to submit more than one bid per license. Bidders might have an incentive to do so if, as proposed below, they are not required to include a deposit with each bid. If multiple bids were permitted on the same license and bidders could choose to decline any bid without cost after all bids are opened, the auction would seem equivalent to a sealed second-bid auction. Bidders would submit bids in increments with the highest bid equal to the maximum amount they are willing to pay. The bidder with the highest bids would decline all bids above the maximum amount offered by the next highest bidder. While the outcome might be the same as a sealed second-bid auction this method could generate huge numbers of applications and have the appearance of manipulation. On these grounds we tentatively conclude that bidders should be permitted only one bid per license. If the Commission determines that under certain circumstances a sealed second-bid auction is appropriate, it would be better to use it directly than introduce it in this way. We note that the limitation would not bar simultaneous bidding on licenses individually and those licenses offered as part of a group.

submit the highest bid. Thus it is less likely under sealed bidding than under oral auctions that licenses would be awarded initially to the parties who value them the most.

42. In a Dutch auction the auctioneer gradually lowers the price until a bid is offered and the item is awarded at that price. A bidder can make only a single offer not knowing what other bidders are willing to pay and the item is awarded to the highest bidder at the price bid. Thus, in theory the optimal bidding strategy in a Dutch auction is the same as in sealed bid auction.[28] In laboratory bidding experiments, however, Dutch auctions tend to result in lower bids than sealed bid auctions.[29] Finally, as with a sealed bid auction, Dutch auctions may not award an item to the party who values it the most, even when bidding is only for a single item. We see no advantage to Dutch auctions and tentatively conclude that they should not be used under any circumstances.

43. In a sealed second-bid auction the high bidder is awarded the item but pays the second highest bid (the highest losing bid). The same concept can be applied to the sales of multiple homogeneous items. In that case the seller chooses the highest set of bids that exhausts the total number of items for sale, but all successful bidders pay the same price -- the highest losing bid. This method has been used on an experimental basis in auctioning U.S. treasury securities.[30]

44. Sealed second-bid auctions combine certain advantages of sealed first-bid and oral auctions. As in oral auctions, second-bid auctions award an item to the party who values it the most.[31] And it is relatively resistant to collusion, as are first-bid sealed auctions. A third advantage is that under standard assumptions, second-bid auctions induce bidders to reveal the maximum amount they are willing to pay.[32] As discussed below, this would be useful when using auctions to determine whether to issue licenses individually or as a package.

45. Nevertheless, second-bid sealed auctions are rarely used. One possible reason for this is that such auctions may reveal a large gap between the amount the winning bidder is willing to pay and what is actually paid.[33] Another difficulty is that bidders may be reluctant to reveal their maximum willingness to pay for fear that this information may subsequently be used to their detriment by competitors, suppliers, unions, or the government.[34] Finally, this approach is generally perceived as being more complex than standard sealed or oral auctions. In light of these difficulties we question whether sealed second-bid auctions should be used in any circumstances but seek comment on this method because of its unique theoretical advantages.

46. *Proposed Bidding Methods.* Given these alternatives, we tentatively conclude that oral bidding should be the Commission's basic auction method and thus recommend its use when the Commission does not explicitly specify some other method. In making this tentative conclusion, we find that the benefits of oral auctions are generally more likely to outweigh the costs of this method as well as the net benefits of the other auction methods considered. Oral bidding is likely to award licenses to the parties that value them the most and facilitate efficient aggregation of licenses when non-homogeneous licenses are offered individually. Moreover, the main disadvantage to oral auctions is the potential for collusion, which we believe can be safely addressed by the measures set forth below.

47. Oral bidding should not, however, be the only auction methodology available to the Commission. New section 309(j)(3) of the Act states that the "Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances." It is our intention to do so. For example, when licenses are offered alternatively as part of a group or individually, as we propose below for certain PCS licenses, we tentatively conclude that sealed bids be taken for licenses as part of a group and oral bids taken for individual licenses. Sealed bids would be submitted prior to oral bidding, and would not be opened until the conclusion of the oral bidding. As discussed below, such a system would avoid the problems that may arise if parties bidding on licenses as a group know the results of bidding on licenses individually or vice versa.

48. When multiple homogeneous licenses are offered, we tentatively conclude that the Commission should experiment with sealed (or electronically filed) bidding methods used by the U.S. Treasury to auction securities. We seek comment on whether in this case each bidder should pay the bid price or a single price equal to the highest losing bid. We also seek comment on our tentative conclusions on bidding methods, as well as whether, and under what circumstances, the Commission should use other bidding methods or variants of the methods discussed here.

49. In those cases when the Commission expects very few bidders we propose to use sealed bid auctions. We tentatively conclude that this approach would minimize the risk of bidder collusion.

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[28] William Vickrey, 16 Counterspeculation, Auctions, and Competitive Sealed Tenders," Journal of Finance 8 (March 1961). *See also* Paul Milgrom, Auctions and Bidding: A Primer, 3 Journal of Economic Perspectives 6 (Summer 1989) (hereinafter Milgrom).

[29] *See* Milgrom at 7.

[30] In September 1992 the Treasury Department began a one-year experiment with single-price auctions. *The Washington Post*, Section H, page 11 (September 13, 1992).

[31] *See* Milgrom at 8.

[32] Because in a second-bid auction the price paid is independent of one's bid, the bidder's situation is analogous to asking someone else to buy an item in the store as long as the price is less than some amount. The optimal strategy is to tell the shopping agent the maximum amount you would be willing to pay for the item. If you understated your willingness to pay the agent might return without the item even though the price was less than what you would be willing to pay. If you overstated your willingness to pay the agent might purchase it for more than it was worth to you. Thus the optimal strategy is to tell the truth. See Milgrom, p.8.

[33] In New Zealand, for example, Telecom Cellular bid NZ $7 million for a cellular license but paid only NZ $5,000, the second highest qualifying bid. In an oral auction the amount Telecom paid would likely have been about the same, but the amount that it was willing to pay would not have been revealed. Such disparities between the first and second bid undermined public confidence in the process and led New Zealand to drop sealed second-bid auctions in favor of standard first-bid sealed auctions. *See* Milton Mueller, Reform of Spectrum Management: Lessons from New Zealand, 13 Policy Insight 20 (Reason Foundation, November 1991).

[34] Michael H. Rothkopf, *et al.*, Why Are Vickrey Auctions Rare? 98 Journal of Political Economy 94-109 (1990).

50. Finally, we request comment on the use of the Small Business Advisory Committee (SBAC) -proposed "innovator's bidding preference."[35] The credit is intended to encourage participation by designated entities, and by strategic small business alliances, by awarding credits equal to 10 percent of an applicant's bid. To the extent the credit is based on technological innovation, we seek comment on whether it is feasible to expeditiously determine eligibility for such credits prior to an auction.

51. Sequence of Bidding. In oral auctions, licenses would be offered sequentially. Electronic auctions could be conducted sequentially or simultaneously. Sealed bid auctions could be held either sequentially or parties could be allowed to bid simultaneously on some or all licenses. Under sequential bidding the amount bid in later rounds can reflect what licenses have been acquired in earlier rounds. This is likely to be better than sealed simultaneous independent bidding in facilitating the efficient aggregation of licenses. The main drawback of sequential bidding is the delay if used to award large numbers of licenses, especially by sealed bid.

52. If bidding is done sequentially the order in which items are offered can affect the outcome. We seek to establish the sequence of bidding that is most likely to facilitate economically efficient aggregation of licenses across geographic regions and spectrum blocks while complying with the statute. One approach would be to auction all geographic regions within a spectrum block before proceeding to auction the next spectrum block. This approach is likely to be best when aggregation across geographic areas is more important than aggregation across spectrum blocks. This would be the case when the geographic scope of licenses is small relative to the efficient geographic scale while the bandwidth per license is sufficient to achieve the minimum efficient scale of operation. Another option would be to auction all blocks in a given geographic area before proceeding to auction licenses in the next geographic region. This approach would be best when bandwidth per license is small and geographic scope large such that aggregation of licenses in the same geographic area is likely.

53. When licenses are offered sequentially within a given spectrum block, one option would be to offer the regions in descending order of population. This would enable firms seeking to create regional service areas to acquire the largest market in the region before bidding on smaller surrounding markets. Presumably the value of a small market adjacent to a large market is more dependent (in percentage terms) on whether one also holds the large market than the converse. Thus it would seem more useful to most bidders to know which big markets they had won before bidding on smaller markets. Another option would be to offer licenses by large geographic regions. For example, the Commission might first offer all licenses in the eastern section of the country, and offer licenses within that area in descending order of population. This approach might facilitate aggregation by large geographic regions. If an oral auction is used, the Commission might hold the auctions within the large geographic area that is being licensed.

54. The preferred sequence of offering across spectrum blocks is less clear. One option would be to auction blocks in descending order of bandwidth, *e.g.*, offer 30 MHz licenses before 20 MHz licenses. We seek comment on the circumstances in which alternative sequences of bidding would be most likely to result in an efficient aggregation of licenses and best meet the Commission's other auction design objectives.

55. When bids are taken simultaneously for all items in a sealed bid auction the order in which bids are opened typically does not matter. However, as discussed below, the order does matter when bidders are permitted to place a ceiling on the total amount they wish to spend, or if bidders can withdraw bids when the sealed bids are opened. In these cases the order of opening bids must be specified in advance. If spending limits are adopted or if bids can be withdrawn without penalty, a reasonable option would be to open bids for licenses in descending order of market size as measured by population. We seek comment on this and other options for the order of opening sealed bids.

56. We also seek comment on the advantages and disadvantages of simultaneous ascending bid electronic auctions. Under this approach, multiple licenses would be put up for bid at the same time. Such auctions may facilitate the efficient and rapid aggregation of licenses by providing bidders with simultaneous information about the value of licenses in multiple markets. This technique has not been widely used, however, and may take longer to implement than the other bidding methods. We specifically ask for comment on the feasibility of implementing it in time to meet the statutory deadlines for commencing PCS licensing.

57. Bidding for Groups of Licenses. Allowing bids for both individual licenses and groups of licenses ("combinatorial bidding") may reduce the transactions costs in efficiently aggregating licenses.[36] Bidding on individual licenses, even sequentially, does not allow bidders to fully express the interdependence of license values and does not ensure that groups of licenses are assigned to their highest valued use.[37] One way to facilitate efficient aggregation is to allow bidding for groups of licenses that are likely to have more value as a package than individually. For certain spectrum blocks we could accept bids both for licenses individually and for all the individual licenses in the block. Licenses would be awarded as a group if a bid for the licenses as a group exceeded the sum of the highest bids for the licenses individually. If the sum were greater than the highest bid for the group, licenses would be awarded individually. In either case, the same eligibility, performance and other requirements would apply to each individual license.

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[35] *See* FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen. Docket 90-314 (September 15, 1993) (SBAC Report) at 14-15 (which has been included in the docket of this proceeding and is available from the Commission on request).

[36] *See* Letter of the Honorable John D. Dingell, M.C. to the Honorable James H. Quello, Chairman, Federal Communications Commission (September 21, 1993) (a copy of which has been included in this docket and is available to the public).

[37] For example, with sequential bidding a firm's bid in the early rounds would not be able to reflect whether the firm was able to acquire contiguous licenses in later rounds. John Riley and William Samuelson. Optimal Auctions, American Economic Review 389 (June 1981) (hereinafter "Riley and Samuelson").

58. We tentatively conclude that in the initial application of combinatorial bidding the Commission should require submission of sealed bids for groups of licenses and then conduct oral auctions for individual licenses. We believe that this avoids providing an undue information advantage to bidders for a group of licenses. The alternative of first auctioning licenses individually, announcing the results, and then offering licenses in groups would permit bidders for a group of licenses to outbid the announced aggregate bid for single licenses without permitting a counteroffer. This might bias the outcome in favor of group licenses.

59. We also tentatively conclude that bidding for groups of licenses should be by sealed bid and that the bids should not be opened until after completion of oral bidding for individual licenses. If it became apparent that a bid for a group of licenses was likely to exceed the sum of the individual bids, bidding would virtually cease for the remaining individual licenses.

60. A possible refinement to the proposed procedure for implementing combinatorial bidding would be to provide for an additional round of bidding limited to winners of the first round. Winners of the first round would be given an opportunity to increase[38] their bids by submitting a sealed "final and best" offer. Licenses would be awarded as a group if the final bid for the licenses as a group exceeded the sum of the final bids for licenses individually. Winners would pay the prices bid in the final round. Such an additional round of bidding would allow for a counter offer by the parties who won in the first round but were not awarded a license in the first round under the combinatorial bidding rule.

61. We seek comment on the general concept of combinatorial bidding,[39] on our tentative conclusions for implementation and on possible refinements. We also specifically seek comment on the Commission's authority to use this auction method.[40]

62. We also seek comment on the experimental use of sealed second-bid auctions when offering licenses in groups and bidding is not expected to be intense. When few bidders are expected, bids may be less than the maximum amount parties are willing to pay and both oral auctions and sealed first-bid auctions may create a free rider problem for parties bidding on individual licenses. That is, even though all the tentative winners of individual licenses might benefit if licenses were issued individually, without cooperative action each might refrain from raising his bid in the hope that others would raise their bids enough that the licenses would be issued individually at no additional expense to himself. The free rider problem could be avoided if the Commission used an auction method that induced bidders to reveal the maximum amount they would be willing to pay for individual licenses. The sealed second-bid auction discussed above appears to be the most likely to do this, although it may have other defects. Under this approach a group of licenses would be issued only if the bid for the group of licenses exceeded the sum of the maximum amount bidders were willing to pay for individual licenses. Furthermore, if bidders truthfully bid their maximum willingness to pay, this efficient result would hold whether bids for individual licenses and a group of licenses were tendered sequentially or simultaneously. Finally, we also request comment on the use of combinatorial bidding in simultaneous ascending bid auctions.

63. Limitations Placed by Bidders on Winnings or Expenditures. If we allow sealed bids to be submitted simultaneously for a number of individual licenses or groups of licenses, bidders may win more licenses than they want. This could be a problem if we required firms to submit a deposit with each bid and were to keep the deposit of the high bidder even if that party declined to accept the license. One way to avoid this outcome would be to allow bidders to specify spending or other limits (*e.g.*, total population in license areas) if they win more than one license. Permitting firms to specify expenditure or other limits in simultaneous sealed bid auctions would reduce their risk, possibly increasing the number of bids and total auction revenue.

64. Allowing bidders to submit a limitation on total expenditures would be easy to administer and would reduce a bidder's fear that winnings may exceed its financial resources. Under this approach, bidders could submit expenditure limits with their bids, and bids would be opened in a sequence announced before the auction. Any winning bid that would cause a bidder to exceed his expenditure limit would be disregarded and the next highest bid considered. Firms not wishing to set any limitation on total expenditures would not be required to do so.

65. We tentatively conclude that permitting bidders to specify such spending limits would not be necessary under oral bidding, electronic bidding, or sequential sealed bidding for individual licenses because these methods permit bidders to limit their expenditures directly. Furthermore, such spending limits would not be needed even under simultaneous sealed bidding if the Commission permits bids for individual licenses to be withdrawn without penalty. Therefore we propose that the Commission experiment with permitting bidder specified expenditure limits if and only if it uses simultaneous sealed bid auctions in which a winning bidder would forfeit a significant payment if the bid is withdrawn.[41] We seek comment on these tentative conclusions.

66. Minimum Bid Requirements. Setting a "reservation" price below which the license will not be awarded could increase the government's expected return by inducing

[38] Bidders would not be permitted to make second round bids that are less than their winning bids in the first round.

[39] In particular, we seek comment on at what point, if any, we should be concerned that aggregation could result in undue market power leading to anticompetitive conduct.

[40] Section 309(j) requires the Commission to prescribe area designation and bandwidth assignments that promote an equitable distribution of licenses and services among geographic areas and prohibits the Commission from making its public interest determination regarding these area designations based on revenue. The House Report explains that this provision is intended to insulate the Commission's communications policy decisions from "budgetary pressures." We do not believe that the proposal described above, which is designed to ensure that spectrum is used for its highest valued use, conflicts with Section 309(j)(7). Moreover, we note that nothing in the Budget Act is intended to be construed to prevent the Commission from issuing nationwide licenses, *see* Section 309(j)(6)(G), or from considering consumer demand as part of its determinations, *see* Section 309(j)(7)(C).

[41] In section E below, we propose to allow sealed bids to be withdrawn without penalty up to the time bids are opened. If this proposal is adopted we see no reason to provide for expenditure limits.

some buyers to raise their bids.[42] For example, revenue would be increased in an oral auction if the reservation price were set above the second highest bid but below the maximum amount the winning bidder is willing to pay.

67. The benefits of setting a reservation price are likely to be greatest when there are very few bidders. When competition is intense the benefits of setting a reservation price may not be worth the cost. Setting a refusal price would require estimating the value of the license, which may be difficult and time consuming. Developing and implementing a procedure to use this estimate in calculating the minimum bid could further delay the initial auction date. Moreover, if no bids exceeded the minimum bid, the Commission would need to wait some interval before it could put the license up for bids a second time. Meanwhile, the public would lose the benefits of the services that could be provided with the spectrum. We tentatively conclude that there should be no minimum bid because the public interest benefits of facilitating the rapid provision of new services are clear, while the possible increase in auction revenues is uncertain. However, we seek comment on the possibility of establishing a minimum bid in auctions where the spectrum to be auctioned has an established value in the marketplace.

B. Alternative Payment Methods

68. Section 309(j)(4) requires the Commission to consider alternative payment methods including initial lump sum payments, installment payments and royalties. The administratively simplest option is to require full payment in a lump sum upon issuance of a license. This would leave financing to the private sector and eliminate the need for the Commission to conduct detailed checks of financial qualifications and creditworthiness. We propose to require full payment in a lump sum for all bidders other than the entities designated in the Act as deserving special consideration by the Commission to ensure their economic opportunity.[43]

69. Allowing installment payments is equivalent to the government extending credit to the winner. This would reduce the amount of private financing needed by a prospective licensee, but it burdens the government with the risk of default. For this reason, we propose to limit this option to the entities designated by the Act as groups + whose economic opportunity should be ensured and are likely to have difficulty obtaining adequate private financing. We seek comment on alternative installment payment options, including options for payment of interest.

70. A third payment method is a combination of an initial payment and royalties. This system is used by the Department of the Interior for outer continental shelf oil and gas leases. Firms bid on the amount of the initial payment and pay royalties at a fixed rate set by the government. If the FCC is licensing a highly risky service and the government (taxpayers) is better able to bear risk than the firm (shareholders) there may be an advantage to have some part of the payment in the form of a royalty. This benefit must be weighed against several difficulties. First, if the royalties are based on the output or revenues of the winning firm they will act as a tax and tend to reduce output. Second, royalties on FCC licenses may be very costly to administer. Unlike oil and gas royalties there is no easily identifiable output associated with the license. To collect royalties on FCC licenses the agency must establish accounting rules for identifying the share of revenues or profits attributable to such licenses. This is likely to prove extremely intrusive and difficult to implement in practice, especially when a license is used by a firm as part of a highly integrated communications service. Finally, the Commission may have difficulty determining an appropriate royalty rate. We seek comment on these tentative conclusions regarding royalties. We are also interested in comments on ways to improve the effectiveness of royalty payments as a possible solution to the entry cost problems of small bidders.[44]

71. In addition, we request comment on the use of alternative payment methods for the entities designated in the Act for preferential treatment, the kind of method(s) that should be offered, which other applicants should be eligible for alternative payment plans, the interest rate, if any, that should be charged, and what standards the Commission or an outside contractor might use to evaluate an applicant's creditworthiness. Finally, we request comment on how the Commission should treat licensees who default on payments owed the government. For example, should licenses be conditioned on timely payments so that a default would result in immediate license cancellation? Should there be any grace periods or an opportunity for restructuring the payment plan? If the Commission should allow a grace period or restructuring of the payment plan, we intend to follow our procedures (including the payment of interest) under the Commission's existing debt collection rules and procedures. *See* 47 C.F.R. § 1.1901, *et. seq.* We also request specific comment on the SBAC's distress sale proposal. The proposal would encourage transfers to designated entities where winning bidders are unable to pay.[45] We request comment on the most efficient administrative mechanisms for implementing these payment options.

C. Treatment of Designated Entities.

72. The new subsection 4(D) of Section 309(j) directs the Commission to ensure - that small businesses, rural telcos, and businesses owned by women and minorities are "given the opportunity to participate" in the provision of spectrum-based services. Congress's objective was apparently to promote economic opportunity for the entities enumerated in the statute.[46]

73. Before addressing specific proposals, it is appropriate to address at the outset the legal issues raised by these proposals. To implement this provision, we are considering a variety of measures including tax certificates, set-asides (*i.e.*, certain designated spectrum blocks to be awarded in auctions open only to applicants that fall under one of the definitions for the eligible entities), bidding preferences, preferential payment terms such as delayed or extended installment payments to qualifying bidders, or other procedures. We note that any benign race or gender-conscious measures mandated by Congress - even those not "reme-

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[42] *See* Riley and Samuelson at 385.

[43] The lump sum payment would be for the balance of the winning bid remaining after payment of the deposit described in section E below.

[44] SBAC Report at 15.

[45] SBAC Report at 16.

[46] *See* Conf. Report at 482-484; *see also* H.R. Rep. No. 103-111 at 255.

dial" in the sense of being designed to compensate victims of past governmental or societal discrimination - are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 560-563 (1990); *see also Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992). In addition, recent case law suggests that any race or gender-conscious preferential measures taken by the government must be supported by a convincing and comprehensive record that demonstrates that the government's methods are substantially related to the goal it hopes to achieve. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. at 560-563; *Lamprecht v. FCC*, 958 F.2d at 399-408.[47] Therefore, because of the special constitutional concerns associated with preferential measures aimed towards minorities and women, it would appear that such race-or gender-conscious measures adopted in this proceeding would have to be supported by a record which demonstrates that such preferences are substantially related to the objectives of the Budget Act.[48] With this in mind, we request specific comment on how we might satisfy concerns expressed in the relevant case law while fulfilling the statutory provisions relating to businesses owned by members of minority groups and women. Measures adopted for the other enumerated entities, rural telcos and small businesses, could be reviewed under a more deferential judicial standard. *FCC v. Beach Communications, Inc.*, 61 U.S.L.W. 45323 (U.S. June 1, 1993).

74. Because case law in this area has a bearing on our legal authority, commenters should address whether we could satisfy the congressional objective simply by affording preferences to small businesses and other small entities, and through this means promote economic opportunity by ensuring that women and minorities are afforded an opportunity to participate. Alternatively, if commenters believe we should go further and provide preferences specifically tied to an applicant's minority or gender status, regardless of economic circumstances, these commenters should discuss how the standard of judicial review for such preferences can be satisfied. For example, commenters may wish to address whether evidence of discrimination against these groups within the context of radio licensing or financial lending practices is required, and if so, what type. If such evidence is required, commenters should point to the source of that evidence, for example, in the record of congressional proceedings or elsewhere. Alternatively, commenters should provide evidence of the degree to which these groups are underrepresented in the ownership of non-broadcast licenses. In this regard, commenters should address the findings contained in the SBAC Report, discussed below, para. 80.

75. While the statute lists all of the enumerated groups together, it does not indicate that each group must be afforded the same type of treatment. Thus, we tentatively concur with the SBAC Report that different approaches may be appropriate to address the specific concerns applicable to each enumerated entity. For example, the Commission could propose deferred payment terms for small businesses and tax certificates for 40 businesses owned by women and minorities.[49] Notably, as discussed above, preferences afforded to businesses owned by women and members of minority groups could apply regardless of whether

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[47] The House Report states that "unlike mass media licenses, where diversity of ownership contributes to diversity of viewpoints, most of the licenses issued pursuant to Section 309(j) will be services where the race or gender of the licensee will not affect the delivery of the service to the public." H.R. Rep. No. 103-111 at 255. We note, for example, that PCS licensees will probably not engage in services that involve the exercise of editorial control. PCS licenses, however, could be used to transmit electronic publications to multiple viewers. We seek comment on whether any of the services subject to competitive bidding possess the characteristics that warrant consideration of diversity factors as a matter of the public interest.

[48] The Act's legislative history concerning the subject provision, Section 309(j)(4)(D), provides little guidance regarding the relationship between the preferential measures and the goal Congress hopes to achieve. *See* Conf. Report at 484. The text of the provision also does not appear to provide a specific finding in support of race- and gender-conscious measures. We note, however, that a similar provision, Section 309(j)(4)C)(ii), refers to the Commission's obligation to ensure "economic opportunity for a wide variety of applicants, including ... businesses owned by members of minority groups and women." The legislative history of this provision, like the text, indicates that Congress' principal objective was to ensure economic opportunity for such groups. *See* Conf. Rep. at 484; H. Rep. No. 103-111 at 255. *See also* Section 309(j)(3)(B)(statutory objective to promote economic opportunity and new and innovative technologies). In this regard, moreover, the Supreme Court has noted that

> [l]imiting our analysis to the immediate legislative history ... 'would erect an artificial barrier to [a] full understanding of the legislative process.' Fullilove v. Klutznick, 448 U.S. at 502 (Powell, J., concurring). The 'special attribute [of Congress] as a plegislative body lies in its broader mission to investigate and consider all facts and iopinions that may be relevant to the resolution of an issue. One appropriate source is athe information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national |aconcern, its Members gain experience that may reduce the need for fresh hearings or aprolonged debate when Congress again considers action in that area.'

Metro Broadcasting, Inc. v. FCC 497 U.S. 547, 568 (1990) (quoting Fullilove v. Klutznick, 448 U.S. at 502-503, and also citing, at 478 (opinion of Burger, C.J.)("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings"). With this in mind, commenters may wish to address other relevant legislative actions concerning, for example, ownership diversity in the communications industry or discriminatory financial lending practices generally.

[49] There is nothing that would appear to prevent a small business that was engaged in the provision of cable television service from being considered a small business within the meaning of the statute.

such businesses are small businesses. In addition, measures such as set-asides may be better suited for some specific services than others.[50]

76. We request comment on the types of mechanisms the Commission might employ to promote the objectives of Section 309(j)(4)(D). As indicated above, we are particularly interested in comments that discuss ways in which the Commission might craft a scheme of preferences that would both fulfill the objectives of the statute and comport with the relevant case law precedent.

Eligibility Criteria

77. In order to administer such measures, we would have to establish criteria for the enumerated entities. In the case of small business, we seek comment on whether we should rely on the definition devised by the Small Business Administration.[51] For businesses owned by women and minorities[52] and rural telcos,[53] we propose to rely on existing Commission rules and policies. Thus, for purposes of this proceeding, we propose that rural telephone companies be defined as those carriers that are eligible for the exemption from the telephone company-cable television cross-ownership restrictions under Section 63.58 of our Rules.[54] We also seek comment about the scope of any specific treatment that might be afforded rural telephone companies. For example, should rural telcos be afforded preferential measures only where the license covers a market area or reliable service area that also encompasses all or some significant portion of their franchised service area? Or should there be no geographic restriction on the rural telephone company preference so that any rural telephone company can obtain a preference in any market licensed by the Commission? Should the fact that some rural telephone companies receive favorable financing from the Rural Electrification Administration have any bearing on the preferences rural telephone companies might receive? Regarding businesses owned by women and minorities, we seek comment on whether to qualify for preferential measures, women and minority backed applicants should be 50.1% owned by these groups or whether simple control is enough to qualify regardless of the percentage of the equity held.[55] In this regard, commenters should address how the Commission can deter potential abuses where less than 50.1% ownership and control is involved.

78. We also specifically request comment on how the Commission could ensure that any policies we might adopt to aid those groups that Congress was particularly concerned about did in fact aid those groups and not others who might merely use a member of one of those groups for the purpose of achieving special treatment by the Commission. In addition, we ask how we should apply such eligibility criteria to consortia, that is, whether such consortia must be wholly or predominantly comprised of the eligible entities in order to qualify for a preferential measure.

Specific Proposals

79. Because we are required to prescribe regulations to implement Section 309(j) within 210 days of the enactment of the Budget Act, we include the following specific proposals applicable to the designated entities.[56] First, we propose installment payments with interest for all of the designated entities in order to ensure their economic opportunity.[57] We request specific comment, however, on whether the installment payment benefit should apply to all of the enumerated entities (including eligible consortia with 9 designated entities) in all services, or only certain entities in certain contexts. Further, we seek comment on how we might further Congress's intent by utilizing tax certificates to ensure economic opportunity for the designated entities. Tax certificates might, for example, be used in addition to the installment payment with interest benefit for certain entities or services.[58] For a more detailed discus-

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[50] *See, e.g.,* the Cellular Radio Service and IVDS, 47 C.F.R. Parts 22 and 95, respectively, where only two licensees serve a particular market.

[51] *See* SBAC Report at 20-21. According to the Report, the SBA administers a variable standard for determining whether an entity is small for SBIC financial assistance purposes. The standard permits an applicant to qualify based on a net worth not in excess of $6.0 million with average net income after Federal income taxes for the two preceding years not in excess of $2.0 million. Alternatively, an applicant can qualify by showing that together with affiliates, and excluding affiliates, it meets the size standard for the industry in which it is primarily engaged as set forth in 13 C.F.R. § 121.601. *See also* 13 C.F.R. § 121.802(a)(2). The SBAC Report, however, also questions whether the existing net worth/income size standard is too low for telecommunications industries, such as PCS, that may be capital intensive.

[52] The Commission has defined term "minority" to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980, n.8 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C. 2d 849, 489, n.1 (1982), *citing* 47 U.S.C. § 309(i)(3)(C) (1982 ed.). In the past, the Commission has included women among its groups eligible for certain preferential measures. Gainesville Media, Inc., 70 F.C.C.2d 143, 149 (Rev. 2d. 1978). *But see* Lamprecht v. FCC, *supra*. *See also* 47 C.F.R. § 1.1621(b).

[53] *See, e.g.,* 47 C.F.R.§ 63.58 (concerning rural telcos).

[54] The Commission has pending a request to modify the definition of rural telephone companies to those serving markets of 10,000 or less. The Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) also has indicated a preference for this definition in the context of PCS. *See* Ex Parte presentation of OPASTCO in the PCS Proceedings, GEN Docket 90-314 (September 15, 1993), *supra*, note 1.

[55] *See* 47 C.F.R. §§ 1.1621(c), 1.1622.

[56] *See* discussion of the applicability of 309(j)(4)(D) to PCS in Part IV, *infra*.

[57] We propose to assess interest at the prime rate (as announced periodically in the Wall Street Journal) plus one percent under the installment plan for such designated entities. The rate could be fixed at the time the installment payment plan begins or could vary with the prime rate. *Cf.* 47 C.F.R. § 1.1940.

[58] At this time, we foresee two examples of tax certificates that could apply to a system of competitive bidding. In the first example, an entity not eligible for preferential measures under the statute ("entity X") "wins" an auction and is granted a license, and then transfers the license to a "designated entity." Entity X would be eligible for a tax certificate. The second example involves an investor in a designated entity that "wins" an auction and is granted a license. The investor would be eligible for a tax certificate upon divestiture of its interest. Commenters should address these specific examples or other possible uses of tax certificates in the context of Section 309(j)(4)(D), such as those recommended in the SBAC Report, discussed below.

sion of installment plans, tax certificates and other preferential measures, commenters should refer to the SBAC Report.

80. The SBAC Report addresses special barriers to telecommunications ownership encountered by women and members of minority groups, and we seek comment on its conclusions. Specifically, the SBAC Report recommends that we satisfy spectrum efficiency and economic opportunity objectives, and avoid undue concentration of ownership by affording licensing opportunities to small (*i.e.*, independently owned, non-dominant) bidders.[59] In addition, it recommends measures to include such businesses through financial certification procedures,[60] bidding credits,[61] installment payments and royalties,[62] distress sales,[63] and tax certificates.[64] The SBAC Report, however, does not suggest the same treatment for each group targeted for the economic opportunity provisions. In support of its recommendations, the SBAC Report cites its finding that "entry opportunities for small service providers have been constrained in existing telecommunications markets by undercapitalization, concentration of ownership, and other conditions contributing to the exclusion of businesses owned by minorities and women." The SBAC Report also found that "[c]apital formation is one of the major barriers to full participation by small and minority businesses."[65] We request comment concerning these measures discussed in the SBAC Report insofar as they relate to spectrum auctions.

81. In a related matter, we seek comment on how we can draft rules to achieve the objectives and requirements of Section 309(j)(3(B) and (4)(C). These provisions also reflect a Congressional concern for the entities discussed above and direct us to, *inter alia*, promote competition by avoiding concentration of licenses and to promote an equitable distribution of licenses among geographic areas. For the purpose of avoiding undue concentration, commenters should address whether the Commission needs to adopt specific rules limiting eligibility for licenses, other than those already in existing service rules. Commenters should include in their comments discussion of whether we should take into account the other radio licenses already held by bidders.

D. Safeguards

82. This subsection addresses three types of safeguards for the auction process. Two of them--measures to prevent "unjust enrichment" and performance requirements--are expressly addressed by the statute. The third--rules prohibiting collusion among bidders--is one that we explore on our own motion.

83. *Preventing unjust enrichment.* The Budget Act directs the Commission to "require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." *See* 47 U.S.C. 309(j)((4)(E). The House Report suggests that, while the Commission should keep track of all transfers of licenses issued via auctions, unjust enrichment is likely to be a problem only in auctions where participation is limited in order to ensure designated entities' opportunity to participate.[66] In an unlimited bidding process, the winner is likely to pay the market price for its license. Hence resale would not involve any unjust enrichment.

84. These considerations lead us to propose that when requests for transfers of designated entity licenses are submitted to the Commission pursuant to Section 310(b), specific provisions be implemented to prevent unjust enrichment for licenses obtained in auctions where members of designated entities have participated pursuant to some specific provision designed to ensure their participa-

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[59] SBAC Report at 1-6, 8.

[60] The SBAC Report recommends that applications from enumerated entities should be allowed to "self-certify" financial qualifications. That is, such applicants could include an investment banker's letter, combined with the applicant's internal funds and bank commitments. In addition, it recommends that SBA chartered Small Business Investment Companies (SBICs) and Specialized Small Business Investment Companies (SSBICs), should be treated as bona fide financial institutions for reasonable assurance purposes. SBAC Report at 12-19.

[61] The SBAC recommended that the Commission protect the public interest in the use of the spectrum by authorizing alternative methods of bidding, bid calculation, and bid payments for bidders with superior service proposals. In particular, alternative bidding calculations would allow technical and non-technical innovators to discount, or amortize, the bid the applicant would otherwise pay based on a qualitative assessment of the applicant's business development proposal. To qualify for the credit, the SBAC Report states that the bidder would have to qualify as (a) a member of a designated entity, or (b) a consortium owned and controlled by firms owned by members of the designated entities. We seek comment on the extent to which members of the preferred groups can be deemed to be "technical innovators," and the extent to which it is feasible to reach such determinations prior to conducting individual auctions.

[62] *Id.*

[63] The SBAC Report recommends use of distress sale procedures where winners are ineligible, unqualified, or unable to pay.

[64] The SBAC Report recommends three ways that the Commission could issue tax certificates. The first SBAC recommendation would encourage relocating microwave incumbents that elect tax certificate treatment to satisfy reinvestment requirements by furnishing capital to designated entities. The second SBAC recommendation involves the Commission issuing tax certificates for investments in and by SSBICs in order to facilitate greater reliance on SSBIC financing for start-up and operational finance of licensees. The SBAC's third recommendation would enable owners and investors of minority owned and controlled service facilities subject to competitive bidding to obtain tax certificates upon sale of their stock interests, provided that the entities remain minority owned and controlled. *See generally* Kansas State Network, Inc. v. FCC, 720 F.2d 185 (D.C. Cir. 1983).

[65] *Id.* at i (Executive Summary).

[66] The House Report notes that "[I]n a system of open competitive bidding, trafficking in licenses should be minimal, since the winning bidder would have paid a market price for the license. Nevertheless, the Committee anticipates that the Commission will monitor trafficking in licenses issued pursuant to the provisions of section 309(j), and will impose any necessary regulations and transfer fees as may be necessary to prevent unjust enrichment. In the event that the Commission limits participation in any given competitive bidding procedure, however, there exists a significant possibility that licenses will be issued for bids that fall short of the true market value of the license. To the extent that the Commission is attempting to achieve a justifiable social policy goal--such as the reservation of appropriate licenses for small business applicants--licensees should not be permitted to frustrate that goal by selling their license in the aftermarket. In these instances, antitrafficking restrictions are necessary and appropriate." H.R. Rep. No. 103-111 at 257.

tion in the provision of spectrum-based services.[67] The Budget Act mentions antitrafficking restrictions and payment schedules as measures available to prevent unjust enrichment. However, an outright prohibition on transfer, even for a limited time such as one year, may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in place owners capable of bringing service to the public expeditiously. In other words, a prohibition on resale could have the unintended effect of delaying service to the public, contrary to the goals of the Budget Act.[68] For this reason, while we seek comment on transfer prohibitions, we request comment on a system of financial disincentives to prevent sellers from realizing any windfall profit from premature sale of a license. This procedure appears to be invited by the language of the House Report, which notes, in its commentary on section 309(j)(4), that "[T]his paragraph expressly authorizes the Commission to impose or assess payments in order to prevent unjust enrichment resulting from trafficking in licenses."[69]

85. We seek comment on this general approach and on the particular form of payment that we should impose on early transfers of licenses granted under preferences and on the interval of time after initial grant during which transfer payments would be imposed. With respect to the amount of the payment, if the preference took the form of deferred payments, perhaps we should provide that all future payments become due to the government when the license is prematurely transferred to a licensee not eligible for the preference. If the preference were a set-aside, the payment could be based on the estimated difference between the price paid at the auction and the price that would have been paid without the set-aside. If both preferences were used, then both types of payments would apply.

86. Implementing this scheme of payments would require estimation of the price that would have been paid in the absence of a set-aside. Where there are clearly comparable licenses awarded by an open auction, this should not be difficult to do. We seek comment on the likelihood that such "comparable" prices will be available. In the event that comparables are not available, we seek comment on how to calculate the payment. One approach would be to permit the seller to recover only the price it paid for the license plus any out-of-pocket expenses it incurred in building facilities or otherwise preparing to provide service. The seller would be required to remit to the government any proceeds received from the transfer in excess of this amount. This would preserve licensee incentives to make the necessary investments in providing service.

87. We also seek comment on whether any interest charges should be included in the payment calculations. For example, if a comparable price is available, the difference between the comparable price and the set-aside price could be viewed as a loan from the government to the preferred licensee. A payment equal to the difference between the comparable and set-aside prices would then constitute recovery of the principal, but it may also be appropriate to collect interest on this "loan." If a comparable price is not readily available, and the amount of proceeds that the set-aside licensee may retain is calculated based on its outlays, in order to preserve investment incentives, it may be appropriate to allow the set-aside licensee to earn some return on its investment outlay. Commenters favoring the use of interest charges of one kind or another should address the issue of the magnitude of these charges. *See also* para. 79, *supra*.

88. All of these proposals leave open the possibility of disagreement regarding the magnitude of the payment to be imposed for premature transfer of a set-aside license. This is a consequence of attempting to preserve licensee investment incentives prior to any transfer. We seek comment on the following alternative, which has the advantage of being unambiguous but may attenuate investment incentives. Licenses granted pursuant to a set-aside could have a condition attached to them to the effect that, in the event of a premature transfer, the initial licensee would pay the amount equal to a certain percentage of the difference between the initial bid price and the transfer price. Commenters favoring this option are requested to propose an appropriate percentage for calculating the payment. We note that even the transfer price may be difficult to determine for deals that are not pure cash transactions. We seek comment on how to calculate a "cash-equivalent" price for calculation of payments. We also seek comment on the simpler procedure of calculating the payment as a fixed percentage of the purchase price and on what the appropriate percentage would be, if we were to adopt this procedure. Finally, we propose as an alternative conditioning designated entities' licenses on there being no premature transfer of those licenses. A forbidden transfer would cause the license to cancel automatically.[70] While drastic, this remedy is self-enforcing and simple to administer.

89. The Budget Act also amends Section 309(i) of the Communications Act to require the Commission, within 180 days of the date of enactment, to "prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a result of the methods employed to issue licenses under this subsection" (*i.e.*, lotteries).[71] The language of this provision

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[67] We seek comment on what information transferees of licenses should be required to furnish to the Commission and, in particular, whether transferees must submit special or additional information when a premature transfer is requested. We also seek comment on the time interval during which transfers should be considered "premature" and thus subject to any special or additional information requirements that we may adopt. Finally, we recognize that there may be situations where such transfers, even if considered "premature" in some contexts, should not be considered "unjust enrichment." If, for example, the Commission issued a tax certificate to permit an investor in a licensee controlled or composed of one or more of the designated entities to sell his or her interest and not recognize the gain on the sale of that interest, we might not consider this gain to be unjust enrichment: the tax certificate would serve as an incentive to invest in the economic opportunity enterprise in the first instance, and any attempt to recapture this profit would work at cross purposes with the purpose of the tax certificate policy, which is to encourage such investment.

[68] *See* 47 U.S.C. §§ 309(j)(3)(A) and (4)(C).

[69] H.R. Rep. No. 103-111 at 257.

[70] P and R Temmer v. FCC, 743 F.2d 918 (D.C. Cir. 1984).

[71] *See* Section 309(i)(1)(C) of the Communications Act, as amended. This provision was adopted from the House bill without change. The legislative history suggests that Congress intended to limit "the ability of lottery winners to sell their license, so as to prevent the churning and profiteering that has characterized lotteries." H.R. Rep. No. 103-111 at 259.

mirrors that of Section 309(j)(4)(E), the subsection requiring the Commission to prevent unjust enrichment from resale of licenses obtained via auctions. The legislative history of that section indicates that the Commission may "impose or assess payments in order to prevent unjust enrichment resulting from trafficking in licenses."[72] We tentatively conclude that we may assess payments to prevent unjust enrichment in the case of lotteries as well. We seek comment on this tentative conclusion and generally on how to implement the new Section 309(i)(1)(C). What antitrafficking restrictions, if any, are appropriate in addition to the payments that we might impose? What should the time period be for any such restrictions, *e.g.*, three years or less? How should the payments be calculated?

90. *Performance Requirements.* The Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[73] The House Report provides a specific example of the warehousing concern, suggesting that "an incumbent service provider could submit a bid for a license in a service that would compete with an existing business, and engage in behavior that would prevent competition from occurring. This would deny the public both the benefit of having access to the new service, and the benefits of competition."[74]

91. As long as transfer of licenses is permitted, valuable spectrum licenses are unlikely to be warehoused, that is, held out of use even though it would be profitable for a firm without market power to provide service using that spectrum. The cost of warehousing is the value of the foregone uses that could be made of the license, either by the licensee itself or by others who could purchase the license from the initial licensee. When the license is purchased by auction, the out-of-pocket expenditure by the licensee makes the cost of not exploiting the license more obvious and explicit, which may be particularly effective in deterring warehousing.

92. We therefore seek comment on the extent to which warehousing might take place and the circumstances, if any, in which it is particularly likely to occur. Additionally, although the statute requires performance requirements, we seek comment on whether we must impose performance requirements for all licenses awarded by auction. Are there circumstances in which the likelihood of warehousing is sufficiently low that requirements are not needed? Are suitable alternatives available, such as restricting ownership of licenses to non-incumbents.[75] We note that for many existing services, Commission rules already include performance requirements (*e.g.*, regulations that specify the time interval within which facilities must be constructed). We seek comment on whether these performance requirements by themselves would be sufficient, whether additional ones are required, or whether any existing performance requirements may be relaxed for licenses to be auctioned.[76] *See also* paras. 102-109, *infra*, which address deposit and other requirements.

93. *Prohibition of collusion.* Although not required by statute, we seek comment on whether the Commission should adopt rules specifically prohibiting collusive conduct. For example, the Commission could prohibit all potential bidders from collaborating, sharing information, or otherwise discussing with one another any information regarding the substance of bids or bidding strategies prior to the completion of the auction. Such rules would serve the objectives of the Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their particular interests and disadvantage other bidders. Moreover, anticollusion rules might strengthen confidence in oral bidding mechanisms[77] and would help ensure that the government receives a fair market price for the use of the spectrum.[78] On the other hand, if anticollusion rules are too tightly drawn, they could prevent the formation of efficiency enhancing bidding consortia that pool capital and expertise of small firms in order to compete against bigger firms, especially for wide area or nationwide licenses. We request comment on how such bidding consortia should be treated. Further, we seek comment on how to deter collusive efforts that could undermine participation by small business entities in a variety of markets, either as part of consortia or as independent entities.

94. We also seek comment on enforcement mechanisms and penalties for violation of anticollusion rules. Does the Commission have adequate resources to investigate and adjudicate collusion allegations? Should the penalty be a forfeiture, license denial, license revocation, prohibition on participation in future auctions, or something else? To what extent is conduct of this nature already prohibited by criminal law provisions outlawing bid rigging,[79] or by the antitrust laws? If current law is adequate to address collusion, should the Commission disqualify from auction participation anyone convicted of an antitrust or similar criminal violation in connection with an FCC auction?

E. Application, Bidding, and Licensing Requirements

95. This subsection seeks comment on what requirements, in addition to existing service-specific qualifications for all applicants, we should impose on prospective bidders and on auction winners with respect to their eligibility and qualifications to hold a license, on how to structure the expedited procedures for "resolution of any substantial and

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[72] H.R. Rep. No 103-111 at 257.

[73] 47 U.S.C. § 309(j)(4)(B).

[74] H.R. Rep. No. 103-111 at 256.

[75] In this context, an incumbent is an entity already licensed to provide a service equivalent to the service that could be provided using the license to be auctioned. Commenters favoring this option should specify which classes of licensee might, for purposes of competitive bidding, be regarded as "incumbents" and what criteria should be used to identify these classes of licensee. Commenters should also address the appropriateness of this approach in the absence of specific limits in existing rules governing multiple ownership or other existing ownership restrictions.

[76] For new services, we would have the opportunity to propose any necessary performance requirements when we propose other rules for those services.

[77] *See* para 38, *supra*, for a discussion of collusion concerns in oral auctions.

[78] In this regard, we seek comment on whether post-application, pre-auction settlement agreements should be banned. *See* para. 160, *infra*.

[79] *See, e.g*, U.S. v. Guthrie, 814 F. Supp. 942 (E.D. Wash. 1993).

material issues of fact concerning qualifications,"[80] and on procedures to follow in the event that the tentative winner is ineligible, unqualified, or unable to pay the amount bid.

96. *Application processing requirements.* The statute requires that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing." Moreover, "[N]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) and sections 308(b) and 310."[81] The House Report comments separately on these two requirements. With respect to the first, it notes that the Commission may require "that bidder's applications contain all information and documentation sufficient to document that the application is not in violation of Commission rules," and states that "applications not meeting those requirements may be dismissed prior to the competitive bidding."[82] With respect to the second requirement, the House Report makes it clear that the statute gives the Commission "the discretion to make this determination only with respect to the winning bid, and does not require the Commission to make this determination for all applicants prior to the competitive bidding procedure."[83]

97. Therefore, in order to reduce the administrative burdens of the initial stages of the auction process, avoid unnecessary delay in the availability of service, and encourage applicants to participate in the process, we propose that, in response to a Commission Public Notice of a filing window or cut-off date in services that are subject to auctions, all applicants interested in participating must file a short-form application (modeled on the Commission's "Transmittal Sheet for Cellular Applications"). We propose that applicants also submit a long-form application at the same time (which, for existing services, will be the application form currently in use),[84] and an application fee,[85] but we tentatively conclude that, prior to the auction, we will review only the short-form applications to determine acceptability for filing. However, we also seek comment on the possibility of reviewing both the long and short form applications prior to the auction, or on requiring submission of the long-form application subsequent to the auction.

98. We seek comment on the information that we should require to be included on the short-form application, but we tentatively conclude that at least the following shall be required: the license for which the applicant wishes to bid, the applicant's name,[86] the & identity of the person who will be making the bid (in the case of an oral auction),[87] certification that the applicant is qualified pursuant to Sections 309(a), 308(b), and 310 of the Communications Act and any other service-specific qualification rules that the Commission might adopt or has already adopted for the particular service,[88] and certification that the applicant satisfies any financial qualifications requirements that the Commission has adopted or might adopt for the service in question.[89] If the applicant wishes to take advantage of any special provisions for the designated entities, the short-form application must contain a statement to that effect and certification that the applicant is, in fact, a member of the group claimed.

99. An application without certification of compliance with Commission rules would be dismissed. We seek comment on procedures for applicants seeking waivers of the rules. Commenters should address in particular the relative advantages and disadvantages of ruling on such waiver requests prior to the auction, rather than after the auction was completed. Denial of any waiver request would preclude participation in an auction. We also request comment on whether we should require different information from different services and expressly ask for comment on information to be filed by PCS applicants.

100. We tentatively conclude that the short-form application should be judged by a letter-perfect standard. In light of the minimal information required, use of a letter perfect standard should not unduly burden or affect applicants. Applications that do not contain all requested information or that otherwise violate the requirements in the rules would be dismissed with no opportunity for resubmission.[90] As we gain more experience with the auction process, we might entertain a more liberal standard in

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[80] 47 U.S.C. § 309(j)(5).

[81] *Id.*

[82] H.R. Rep. No. 103-111 at 258.

[83] *Id.*

[84] In the case of an application for an SMR or IVDS license, for example, the second part of the application would be FCC Form 574. In the case of a cellular applicant, the second part would be FCC Form 401. No additional fee would have to be paid upon submission of the second part of the application. We propose that PCS applicants seeking a license would file on FCC Form 574 if they wished to provide service that is not classified as Commercial Mobile Service under our Section 332 Rule Making and on FCC Form 401 if they seek to provide Commercial Mobile Service. If they seek to provide both types of service, they should file both forms.

[85] This fee would be the applicable Section 8 fee for the service in question. *See* 47 U.S.C. § 158(g). As discussed below in Section IV, we propose Section 8 fees for PCS services.

[86] If the applicant is a corporation, then the short form application should include the name and address of the corporate office and the name and title of a responsible officer or director. If the applicant is a partnership, then the application should include the name, citizenship and address of all partners, and if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee should be included.

[87] In sealed bid auctions, we would need the identity of the person qualified to with draw the bid prior to the opening of any bids. *See* para. 169, *infra*.

[88] *See, e.g.,* the restriction in Section 90.603(c) of our Rules barring wire line telephone common carriers from eligibility in the SMR service and the restrictions in Section 22.901 of our Rules governing the participation of the regional Bell holding companies in the cellular radio service.

[89] We also seek comment, however, on the SBAC's proposal to allow certification of financial qualifications to build and construct based on "highly confident" letters from qualified investment banking firms, venture capital funds, and SBA chartered Specialized Small Business Investment Companies (SSBICs). *See, e.g.,* Advanced Mobile Phone Service, Inc., 91 FCC 2d 512, 517 (1982). We also ask that commenters address the SBAC's proposal to treat SSBICs as financial institutions for purposes of certifying financial qualifications. SBAC Report at 12, 13.

[90] We propose to apply existing rules governing submission of fees. *See* 47 C.F.R. § 1.1101 *et seq.* These rules provide for dismissal of an application if the application fee is not paid, is

order to encourage qualified bidders. At present, however, considerations of time and simplicity appear to require a letter-perfect standard of some sort, although we solicit comment on this matter. With regard to the long-form application, we propose to rely to the extent possible on existing service rules. With that in mind, we seek comment on appropriate standards for evaluating long-form applications. In addressing evaluation standards, commenters should make clear their assumptions about when the long-form application is to be filed and reviewed (*i.e.*, before or after the auction).

101. After we have received applications and conducted an initial review, we propose to issue a Public Notice prior to the auction listing the qualified bidders and would also notify all applicants of whether their applications were acceptable for filing.[91] We seek comment on the appropriate interval of time between this notification and the actual auction, but think it should be at least 45 days. In order to meet our statutory deadline to commence issuing PCS licenses and permits, we may adopt an expedited schedule for our initial PCS auctions. We seek comment on the minimum necessary notice of an upcoming auction. If an auction is to be held, we seek comment on whether we should permit amendments or modifications to the application after it has been submitted. We tentatively conclude that, in order to reduce administrative burdens, no modifications of any kind should be permitted to be filed until after the auction. We seek comment, however, on whether to permit minor, but not major ownership modifications prior to the auction. We also seek comment on the appropriate time period in which we should allow submission of any such amendments and on what would constitute a minor modification in these circumstances, especially if only a short-form application is filed prior to auction. To enforce the purposes of our cut-off rules, we tentatively conclude that major modifications to applications, especially major changes in ownership, should not be permitted.[92]

102. *Deposit and other requirements for entering bids.* In order to realize the Act's goals of ensuring prompt delivery of service to rural areas and promoting rapid deployment of new technology,[93] it is important to limit bidding to serious qualified bidders, and to minimize the probability that, after the auction is over (and the participants have dispersed), the Commission finds that it cannot award a license to the auction winner.[94] To ensure that only serious, qualified bidders participate in our auctions, we propose to require that each participant in an oral or sealed bid auction tender in advance to the Commission a substantial sum (an "upfront payment"), by cashier's check[95] or, perhaps in the future, by electronic funds transfer as a condition of entry to the portion of the auction premises reserved exclusively for bidders.[96] We also seek comment on a proposal that, if a party bids simultaneously on a group of licenses and individual licenses in the group, the upfront payment would be the greater of the sum of the individual upfront payments or the upfront payment for the group. The upfront payment and any additional deposit (*see* related discussion, *infra)* would operate as a financial qualification in those services for which no other demonstration of financial qualification is required.[97] In those services where financial qualifications are required, it would operate as an additional financial qualification requirement.

103. We propose to calculate the magnitude of the upfront payment based on the amount of spectrum and population, *i.e.*, "pops", covered by the license, and announce it in a Public Notice issued prior to the auction. We seek comment on parameters for this calculation that would yield upfront payments large enough to accomplish the Act's goals as described in the previous paragraph. For example, if we used a figure of 2 cents per megahertz per pop,[98] each bidder for a 20 megahertz license for a market with a population of 20 million would need to tender an upfront payment of $8 million in order to be able to bid. For narrowband channels in sparsely populated areas (*e.g.*, public coast stations in the Pacific Northwest region), our proposed formula could yield a very small upfront payment. Even in a market with a population of one million, for some narrowband channels, the payment could be as low as $200. We seek comment on whether such low payments are sufficient to ensure participation by only serious, qualified bidders. Commenters who judge these payments insufficient are requested to comment on alternative formulas. For example, would it be useful to impose a minimum upfront payment of $1,000, $5,000, or some other specific figure?[99]

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insufficient, is in improper form, is returned for insufficient funds or is otherwise not in compliance with our rules. We seek comment on extending these procedures to new services.

[91] Should only one application be acceptable for filing, we shall issue a Public Notice to that effect and, if required, implement the relevant procedures permitting petitions to deny. *See* paras. 110-112, *infra*. We would, however, not hold an auction inasmuch as there would be no mutually exclusive applications.

[92] We specifically request comment, however, on how to process the application of an auction winner who is in violation of our ownership restrictions only by virtue of the fact that an affiliated entity has won another auction held after the first auction's filing deadline. Should we permit such auction winners to modify their applications to come into compliance with our ownership rules?

[93] *See* paras. 12-13, *supra*. *See also* para 18, *supra*, where we tentatively conclude that the Act's purposes would be served by an administratively simple auction procedure.

[94] The auction winner is the party with the highest bid that also tenders to the Commission the requisite deposit within the specified time period.

[95] We further propose that the cashier's checks be drawn in U.S. dollars on a United States bank with assets in excess of one billion dollars and be payable to the Federal Communications Commission. This requirement would make it easier to assure the validity of the cashier's check if the need to do so arose.

[96] We seek comment on the alternative procedure of only requiring auction participants to exhibit the upfront payment as a condition of entry to the portion of the auction premises reserved exclusively for bidders.

[97] In many services, we require licensees to demonstrate that they have sufficient funds to build and operate the facilities to be licensed for a period of time.

[98] The Congressional Budget Office estimates the auction value of a 25 megahertz PCS license to be approximately $15 per pop or about 60 cents per pop per megahertz. Congressional Budget Office, AUCTIONING RADIO SPECTRUM LICENSES 15 (March 1992). Our proposed up-front payment of 2 cents per pop per megahertz for such a license would thus equal only about 3 percent of the winning bid.

[99] We also seek comment on whether upfront payments for licenses in higher frequency ranges, *e.g.*, above 10 GHz, should be reduced to reflect the generally lower per MHz value of spectrum in such ranges.

104. While the requirement to tender (or perhaps only to exhibit) a substantial upfront payment should exclude frivolous or manifestly unqualified bidders from participating in auctions, we are also eager to minimize the probability that, after we examine an auction winner's application and call for the balance of its bid, we find that we cannot award a license to the auction winner. To minimize this probability, we tentatively conclude that, before a bidder is declared the auction winner and the auction is terminated, that bidder must tender a significant and non-refundable sum to the Commission.[100] We therefore propose that the high bidder tender its upfront payment to the Commission immediately, if that payment has not already been tendered to the Commission. However, we question whether the prospect of losing an upfront payment of the magnitude described above provides sufficient incentive to applicants to ensure that they meet all qualifications and financial requirements for grant of the license. We therefore propose that, if the upfront payment were less than 20 percent of the high bid,[101] the bidder would also have to pay the difference promptly.[102]

105. We seek comment on when the 20 percent deposit should be due to the Commission. One option is to require immediate payment by the high bidder. Once the deposit payment is made, the high bidder is declared the auction winner, thus completing the auction, after which the participants disperse. This option makes it possible to continue the auction if the high bidder cannot tender the necessary deposit. It is our preferred option in the case of sealed bids, where bidders would know in advance the exact amount needed to make a 20 percent deposit. However, because collecting an additional payment of uncertain size, as would be necessary under this procedure in an oral auction, may be difficult to accomplish immediately, we seek comment on the method of payment for this amount (cashier's check, or perhaps in the future, electronic funds transfer, etc.) and on whether it is practical to keep an oral auction open while the high bidder provides that additional payment. 106. We also seek comment on the advantages and disadvantages of providing additional time, say one or two business days, for oral auction bidders to tender to the Commission the balance of the 20 percent deposit. This option has the advantage of reducing the administrative burden on winners, and it could still be sufficient to prevent the delay in service to the public that would result if we processed the winner's application, with attendant petition to deny pleading cycles, only to find that the winner does not have the requisite funds. However, if the high bidder fails to provide the balance of its deposit within the next few days after the auction, it would be necessary to conduct another auction, or alternatively, to offer the award to the second highest bidder. We request comment on this option.

107. Another option on which we seek comment is to treat the upfront payment alone as the deposit. Were we to do so, it might be advisable to alter the formula to yield larger upfront payments. This option has the advantage of administrative simplicity, but in cases where the Commission significantly underestimates the value of the license in question and therefore specifies an upfront payment that is very low relative to that value, the upfront payment may be too small to provide the necessary incentives to applicants that are outlined in paras. 102 and 104. We seek comment on which of these procedures (or some other alternative) would effectively preclude frivolous or fraudulent bidding while not unduly burdening serious, qualified applicants.

108. In the case of sealed bid auctions, we propose to permit bidders to withdraw prior to the opening of any bids. This procedure would also allow bidders to take into account the licenses previously won and accepted and thus facilitate efficient aggregations.[103] As described below (*see* paras. 167-171), an interval of 60 days or more may elapse between the application submission deadline and the auction. Market and technological conditions may change within that time period. If participants in sealed bid auctions are required to submit their bids along with their applications, then they could be at disadvantage, particularly in cases of combinatorial bidding. Therefore, we propose that sealed bids be submitted five days prior to the auction. We seek comment on whether this is an appropriate interval.

109. We also specifically seek comment on the Commission's authority to retain the upfront payment or deposit in the event that an auction winner subsequently is found ineligible or unqualified or is unable to pay the balance of its bid at the appropriate time. Section 309(j) requires the Commission's auction procedures to promote "efficient and intensive use of the electromagnetic spectrum" and directs the Commission to "promote investment in and rapid deployment of new technologies and services." Moreover, we have concluded above at para. 18 that Section 309(j)'s purposes would be furthered by an administratively simple auction process. In order to accomplish these goals, we tentatively conclude that some strong incentives must be in place to deter frivolous bids or unqualified bidders that could leave the Commission without an auction winner that is qualified and eligible to receive a license. We note that the new law specifically directs the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures ... to promote investment in and rapid deployment of new technologies and services."[104] We also seek comment on alternative approaches, such as barring such applicants from future auctions, in the event that we do not have authority to keep deposits. Additionally, we seek comment on other

[100] We propose to return the upfront payments of bidders that are not auction winners as soon as we have verified receipt of the full deposit of the auction winner. Because the Commission does not maintain interest bearing accounts with the U.S. Treasury, we would be unable to pay interest on any monies received, and therefore, we can not now pay interest on such deposits. We seek comment on whether we should take the necessary steps to open interest bearing accounts.

[101] A 20 percent downpayment is required for bids on offshore oil and gas leases. New Zealand required a 25 percent deposit be submitted with bids for spectrum licenses.

[102] The upfront payment and any additional deposit payments are part of the applicant's bid. They are separate from any additional financial qualification requirements for licensing (*i.e.*, requirements to show that the applicant has sufficient additional funds to build and operate the facilities to be licensed).

[103] *See* paras. 63-65.

[104] 47 U.S.C. § 309(j)(4)(B). *See also* H. R. Rep. No. 103-111 at 257 (Commission authorized to impose payments to prevent unjust enrichment from trafficking; House Committee on the Budget anticipates Commission will use this authority to deter participation in licensing process by those who have no intention of offering service to the public).

methods the Commission might use to ensure that only serious and otherwise qualified bidders participate in any type of auction we might hold.

110. *Resolution of substantial and material issues of fact concerning qualifications.* The statute directs the Commission to adopt expedited procedures consistent with the provisions of section 309(i)(2) to resolve substantial and material issues of fact concerning qualifications.[105] This provision requires us to entertain petitions to deny the application of the auction winner if petitions to deny are otherwise provided for under the Communications Act or our Rules. We also seek comment on whether we must adopt petition to deny procedures for services in which we propose to auction licenses but which do not now have petition to deny procedures.[106] Should we decide to permit petitions to deny for such services, we would utilize existing procedures where appropriate. If petitions to deny are required for any new services, we shall adopt specific procedures on a service-by-service basis.

111. We seek comment on two possible schedules for entertaining petitions to deny in cases where such petitions are required. In order to expedite the auction process and attenuate incentives for auction losers to "gang up" on the winner, we could put all applications on Public Notice upon receipt, even though we might have reviewed only the short-form applications (*see* para. 97, *supra*), and allow 30 days for petitions to deny. This procedure would elicit all petitions prior to the auction (*see* para. 96 above). We seek comment on whether we would be required to accept at a later date supplements to petitions to deny from petitioners claiming to have acquired new information. How would a requirement to accept such supplements affect the advisability of this particular petition to deny schedule? An alternative petition to deny schedule would place only the auction winner's application on Public Notice for 30 days following the auction. Interested parties could then file petitions and the auction winner will reply. We seek comment on this tentative procedure and on when the application should be placed on public notice.

112. We also seek comment on what procedures consistent with section 309(i)(2) we should adopt in the event that the Commission identifies substantial and material issues of fact in need of resolution.[107] We tentatively conclude that the Commission need not conduct a hearing before denial if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination. We also note that, notwithstanding any other provision of law, section 309(i)(2) permits in any hearing the submission of all or part of evidence in written form and allows employees other than administrative law judges to conduct hearings. Commenters should thus address both the use of written proceedings and the participation of employees other than administrative law judges (or the Commission itself) in these proceedings.

113. *Procedures when tentative winner is ineligible, unqualified, or unable to pay.* As explained at para. 102, *supra*, we have concluded that, to prevent undue delay in the auction process, measures and procedures must be in place to reduce the risk that auction winners are later found to be unqualified, ineligible, or unable to pay the balance of their bid. We have proposed that the Commission would retain the auction winner's deposit (20 percent of its winning bid)[108] in the event that the winner is found to be unqualified, ineligible, or unable to pay the balance of its bid. We believe that the prospect of losing such a significant deposit will provide a strong incentive to bidders to ensure that they have adequate financing and that they meet all eligibility and qualification requirements. If an auction winner is later disqualified for any of the reasons mentioned in this paragraph (an event that we expect to happen rarely), we propose that the Commission would hold a new auction. We seek comment on this analysis and suggested procedure. We expressly seek comment on whether, or in what circumstances, such auctions should be open to new bidders, as well as those who participated previously.

IV. Specific Services

114. We focus now on those classes of licenses and permits that should be included within or excluded from competitive bidding. We propose, for this purpose, to divide the licenses and permits issued by the Commission into two broad groups. The first group, such as PCS licenses, consists of classes of licenses or permits for which it is imperative to decide quickly whether and how those licenses should be subjected to competitive bidding. The second group consists of licenses and permits for which a decision on competitive bidding, while important, is not required as quickly for the first class.

A. Personal Communications Services (PCS)

115. The Budget Act requires us to conclude the various dockets collectively known - and commonly referred to as the PCS proceedings[109] within 180 days after enactment of that Act. We are further required to commence licensing within 270 days after enactment of the Budget Act. It is, therefore, imperative to resolve quickly the question of whether and how PCS would be the subject of competitive bidding.

116. In the *Narrowband PCS Order*, ET Docket No. 92-100 and GEN Docket No. 90-314, FCC 93-329 (released July 23, 1993) we defined PCS broadly as composed of a "wide array of mobile, portable and ancillary communications services to individuals and businesses," *Order* at paras. 13-14. Judging from the nature of the comments and the identity of the commenters that we have received to date in the PCS proceedings, we anticipate that many PCS licensees will operate in the manner contemplated by new Section 309(j)(2)(A). Specifically, we expect the principal use of PCS spectrum, considered as a class, is reasonably likely to involve the licensee receiving compensation from subscribers in return for enabling those subscribers to

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[105] 47 U.S.C § 309(j)(5) forbids the granting of licenses as a result of competitive bidding unless the Commission determines that the applicant is qualified.

[106] The application procedures for certain private radio applications do not contemplate the filing of petitions to deny. *See* 47 U.S.C. §§ 309(b) and (d)(1).

[107] Among the procedural models on which we seek comment are those for mutually exclusive cellular applications in the top 30 markets (*see* 47 C.F.R. § 22.916(b)) and those for certain lotteries (*see* 47 C.F.R. § 1.822(b)).

[108] If we only require an upfront payment (and do not require a 20 percent deposit), then, in these circumstances, the Commission would retain the upfront payment.

[109] *See* n.1 , *supra*.

transmit or receive communications on frequencies on which the PCS licensee is authorized to operate.[110] We request comment on our tentative conclusion.

117. Turning next to whether the criteria of Section 309(j)(3) would be satisfied by competitive bidding for PCS licenses (assuming that the criteria in Section 309(j)(2)(A) are satisfied), we address each of the criteria individually. First, we believe that the use of competitive bidding will speed the development and rapid deployment of PCS service to the public, including those residing in rural areas, with minimal administrative or judicial delays as required by Section 309(j)(3)(A). For some time now, our experience with the comparative hearing process has been less than satisfactory in terms of both administrative and judicial delay.[111] We anticipate that competitive bidding will ensure that PCS licenses end up more quickly in the hands of those who will provide service to the public without the delays attendant to the comparative hearings: competitive bidding should avoid some of the vigorous and time consuming litigation over admittedly fine points of fact and law that can make the difference in a comparative hearing.[112]

118. With respect to promoting the objectives of Section 309(j)(3)(C), competitive bidding will recover for the public a portion of the value of the spectrum made available for commercial use. We believe that competitive bidding is much more likely to recover . a greater proportion of the value of the spectrum for the public than existing methods of awarding licenses.[113] Currently, the only direct monetary compensation the public receives for use of the spectrum is, with few exceptions, the application fees paid by most Commission applicants. Further, as made clear by the Conference Report, the new fees established by Congress in Section 9 are intended to recover the costs of the Commission's activities with respect to those licensees. Thus, any relationship that these fees may bear to the intrinsic value of the license would likely be coincidental. We also discuss above our general proposals, applicable to PCS, which are designed to avoid unjust enrichment as well as our proposals concerning PCS bidders that are eligible for preferential measures.[114]

119. Finally, in accordance with subsection (j)(3)(D), we ask whether competitive bidding will promote efficient and intensive use of the spectrum. We believe that it will, both in general and in the particular case of PCS. Even without performance requirements, licensees have an incentive to use spectrum efficiently and intensively in the provision of a service if that spectrum can be put to some other valuable use by themselves or others. The broader the service definition and the fewer restrictions on the transfer of licenses, the greater the forgone earnings from using spectrum wastefully. Auctions are likely to reinforce the desire of licensees to make efficient and intensive use of the spectrum. Auctions make explicit what others are willing to pay to use the spectrum, and the licensees' need to recoup the out-of-pocket expenditure for a license may provide additional motivation to get the most value out of the spectrum.

120. We tentatively conclude that bidding for groups of licenses should be given a significant test in licensing broadband, but not narrowband, PCS (GEN Docket No. 93-314). Specifically, we propose this combinatorial bidding for awarding the 51 MTA licenses on each of two 30 MHz spectrum blocks (blocks A and B).[115] We would accept sealed bids for all 51 licenses on block A as a group. Then we would conduct oral auctions sequentially for individual MTA licenses on block A. The sealed bids would be opened only after the 51 oral auctions have been completed. If the winning nationwide (sealed) bid on block A is greater than the total of the winning regional (oral) bids for block A, all the licenses on block A would be awarded as a group. The same procedure would then be repeated for block B. We seek comment on this tentative proposal. We also seek comment on providing a second round of sealed bidding limited to the winners of the first round if combinatorial bidding is used. *See infra* at para. 60.

121. We sought comment above on our general proposals to disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minorities and women ("designated entities") in order to promote the objectives of Section 309(j)(4)(D). In the specific case of broadband PCS, we propose to set aside two blocks of spectrum nationwide, one of 20 MHz (Block C) and one of 10 MHz (Block D), in the broadband PCS service, reserved for bidding purposes to the designated entities. *See* PCS Report and Order, GEN Docket 90-314, 8 FCC Rcd _____ (1993). In this manner, the designated entities for which the Commission is required to ensure economic opportunity would only bid against one another for this service, and thereby be safeguarded from having to bid against other entities that, under Section 309(j)(4)(D), do not need special measures. In addition, we propose to allow the designated entities to use installment payment plans with interest for bids within the set-aside blocks.[116] Because this proposal provides access to capital to facilitate bids for specific, set-aside blocks

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[110] We anticipate that this would be the case with both "wideband" and "narrowband" PCS services. We have provided that some PCS services would be unlicensed, and do not propose to apply competitive bidding to that class of PCS service.

[111] See, e.g., Kwerel and Felker, "Using Auctions to Select FCC Licensees," OPP Working Paper Series No. 16, May 1985. In our experience, most comparative hearings for licenses in rural areas do not proceed appreciably faster than comparative hearings for licenses in most urban areas.

[112] *See, e.g.*, Judge Leventhal's dissent in Star Television v. FCC, 416 F.2d 1086 (D.C. Cir. 1969), cert. denied 396 U.S. 888 (1969).

[113] Kwerel and Felker, *supra*, at 16-20.

[114] We do not believe that comparative hearings to issue PCS licenses are a realistic alternative given the statutory mandate for the rapid deployment of new technologies and services and specifically the short deadline within which Congress has required us to begin issuing PCS licenses. We believe that the use of lotteries is similarly precluded given the likelihood that PCS is likely to have subscribers and in light of Congress's direct intent that lotteries be employed only when the Commission determines what services are not for a use described in Section 309(j)(2)(A). We nevertheless request comment on these conclusions.

[115] Should we be concerned, and if so to what extent, that combinatorial bidding to provide national service would result in anticompetitive behavior?

[116] We propose to assess interest at the prime rate (as announced periodically in the Wall Street Journal) plus one percent under the installment plan for such designated entities. The rate could be fixed at the time the installment payment plan begins or could vary with the prime rate. *Cf.* 47 C.F.R. §

of PCS broadband spectrum, we believe it would ensure economic opportunity for the designated entities identified in Section 309(j)(4)(D). We seek specific comment on this proposal concerning the designated entities for broadband PCS. We also seek comment on whether to afford this installment plan preference to the designated entities when they bid for non-set-aside blocks of broadband PCS spectrum, and whether tax certificates should be provided to the designated entities that bid either within or without the set-aside spectrum blocks. Finally, we ask whether consortia that include among its members certain designated entities should be eligible for preferential measures when they bid for spectrum generally. If such consortia are eligible, we propose to make available the same investment incentives (*e.g.*, deferred payment plan with interest) as would be available to other eligible designated entities.

122. In the case of narrowband PCS, we believe that our general scheme of preferential measures, discussed above, is appropriate. That is, because we expect to auction thousands of narrowband PCS licenses, we do not propose a specific block of spectrum set-aside for bidding purposes. Rather, we propose to allow all designated entities to use installment payments with interest for payment of their bids. We believe that this proposal would help ensure the economic opportunity of such entities to promote the objectives of Section 309(j)(4)(D). In addition, we seek comment on whether, and if so, how, we should apply tax certificates to the designated entities that seek to bid for narrowband PCS. We request comment on this proposal for narrowband PCS.

123. We also seek comment on whether combinatorial bidding should be used to facilitate grouping of broadband PCS licenses with BTA service areas. Specifically we request comment on whether the Commission should accept sealed bids for all BTA 0 licenses within each MTA and conduct oral auctions sequentially for individual BTA licenses. If a winning bid for all the licenses within a MTA is greater than the total of winning BTA bids, all the BTA licenses within the MTA would be awarded as a group. Commenters should address whether combinatorial bidding should be permitted on the two blocks we propose to set aside for designated groups. Allowing combinatorial bidding might, on the one hand, enhance the ability of the designated groups to compete with other licensees, but on the other hand, it might exclude participation by the individual small business applicants.

124. We also seek comment on the use of this approach to aggregate 10 MHz broadband PCS licenses into 20 MHz or 30 MHz blocks. Finally, we request comment on using this technique to permit aggregation across both geographic areas and spectrum blocks. For example, the Commission could accept a group bid on all BTA licenses on two 10 MHz spectrum blocks within each MTA.

125. We also propose that within each spectrum block we would auction the biggest markets first in both narrowband and broadband PCS. Auction winners of licenses for large cities might well seek to cluster smaller markets around a large market "hub" in order to achieve economies of scale and scope. We note that the cellular industry has generally developed in this manner, indicating that this may be an economical and efficient business strategy. We also seek comment on the sequence of auctioning PCS licenses across spectrum blocks.

126. We also plan to utilize our earlier proposal of 2 cents per pop per MHz for the upfront payment in both narrowband and broadband PCS auctions. By our calculation, for example, the upfront payment for a 50 KHz nationwide unpaired narrowband PCS license would be approximately $260,000 (260 million pops multiplied by 1/20 of a MHz multiplied by 2 cents).[117]

127. We have incorporated certain performance requirements into our requirements for licensees in both the narrowband and wideband PCS services with which auction winners will be required to comply. *See generally*, PCS Reports and Orders. As noted above, auction winners will, of course, also have to comply with restrictions on incumbents already promulgated in those dockets.

128. We propose that all PCS applicants seeking a license would file on FCC Form 574 if they wished to provide service that would not be classified as Commercial Mobile Service under our Section 332 Rule Making and on FCC Form 401 if they seek to provide Commercial Mobile Service. If they seek to provide both types of service, they should file both forms and pay both fees.[118] For Commercial Mobile Service providers, we propose !1v that the standard for filing FCC Form 401 be similar to the one applied to cellular applications for new stations proposing to provide service to Rural Service Areas (RSAs). Under this standard, applicants would be required to demonstrate that they have the available financial resources to meet the realistic and prudent estimated costs of constructing and operating their facilities for one year. The application of the RSA standard has provided the Commission with sufficient information to afford a preliminary determination regarding the applicant's general qualifications without imposing a disproportionate administrative burden upon either the applicant or the Commission's processing staff.[119] In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R. §§ 22.3-22.45 22.917(f), and 22.918-22.945. For those PCS applicants who file on Form 574, we believe that sections 90.113-90.159 of our rules, 47 C.F.R. §§ 90.113-90.159, could be used to process those applications with appropriate modifications. We seek comment on what those modifications should be.

1.1940. A license would be conditioned on timely payment of these sums. Default would cause the license to cancel automatically and the spectrum would be subject to re-auction.

[117] Pops would be determined based on 1990 Census data.

[118] We propose to exempt from competitive bidding entities forcibly relocated by our orders in ET Docket No. 92-9: First Report and Order, 7 FCC Rcd 6886 (1992); Second Report and Order, FCC 93-350, released August 13, 1993; Second Report and Order, FCC 93-351, released August 15, 1993, in order to safeguard the public interest. The only reason these entities would fall under the statute's criteria for "initial licenses" is because they have been forced to relocate. In fairness to such relocated licensees, we believe this proposed action is consistent with the requirement in Section 309(j)(3) that the Commission safeguard the public interest. We request comment on our tentative conclusion.

[119] *See* 47 C.F.R. §§ 22.12 and 22.923.

129. We will shortly develop a PCS short form application/transmittal sheet along with instructions on how and where to send the application along with the appropriate fee. We propose that for PCS applications, no modifications of any kind be permitted until after a winning bidder has emerged, and propose to charge a $230 fee for commercial mobile service PCS applications and a $35 fee for private mobile PCS applications.[120]

130. Consistent with our general proposals discussed earlier, we would use competitive bidding where we receive two or more mutually exclusive PCS applications for the same frequency or frequency block in the same market (*e.g.*, BTA, MTA). We further propose to utilize a one day filing window similar to the procedures used in other services such as the Cellular Radio service.[121] The one day filing window has worked well in other services, has allowed the Commission to process large volumes of applications expeditiously and, at the same time, kept applicants' filing expenses to a minimum.

B. Private Radio Services.

Part 90 - Private Land Mobile Services.

131. *The 220-222 MHz Land Mobile Systems (Subpart T of Part 90).* The 220 42 222 MHz Land Mobile Systems licensed under Subpart T (hereafter 220 MHz) are a new service consisting of three categories of licensees: Commercial Nationwide providers, who we anticipate will provide service to subscribers for compensation; Noncommercial Nationwide providers, who we anticipate will provide service principally for internal use; and Local providers, who may do either. Although we might consider all 220 MHz licenses as a single class of service, we propose instead to subdivide them into several subservice categories, some of which would be eligible for competitive bidding.

132. The 220 MHz Local licensees may, at their discretion, provide communications service either for internal purposes or to subscribers for compensation without seeking advance permission from the Commission. Because most such licensees have not begun providing service, it is too early to determine whether it is reasonably likely that 220 MHz Local licenses will be used primarily for the provision of service to subscribers for compensation.[122]

133. For future reference, however, we request specific comment on whether it is reasonably likely that initial mutually exclusive applications for 220 MHz Local licenses generally should be subject to competitive bidding under the criteria in Section 309(j).[123] If the principal use of all 220 MHz licenses or 220 MHz Local licenses as a class is for the provision of service to subscribers for compensation, we might find that all mutually exclusive 220 MHz or all mutually exclusive 220 MHz Local applications (with the exception of those frequencies reserved exclusively for public safety purposes)[124] should be subject to competitive bidding.

134. For 220 MHz Noncommercial Nationwide systems, our rules require that these systems be used for the internal business communications of the licensee although they are permitted to make excess capacity available.[125] Therefore, because it is not "reasonably likely" for purposes of section 309(j) that the principal use of such licenses will involve the receipt of compensation from subscribers for communications services rendered, it appears that the 220 MHz Noncommercial Nationwide systems should not be subject to competitive bidding.

135. On the other hand, mutually exclusive applications for the 220 MHz Commercial Nationwide band are reasonably likely to involve primarily a subscriber-based service.[126] Therefore, in the event the Commission is unable to complete licensing in the 220 MHz Commercial Nationwide band from among those applicants who had filed prior to the July 26, 1993 deadline established by Congress, we propose to subject any future mutually exclusive applications for the 220 MHz Commercial Nationwide licenses to competitive bidding. We seek comment on whether subjecting the 220 MHz Commercial Nationwide band to competitive bidding would promote the objectives of 47 U.S.C. § 309(j)(3). Consistent with our discussion of IVDS below, however, we believe that "private service" applicants that are mutually exclusive with subscriber-based applicants for the 220 MHz Commercial Nationwide band should be subject to competitive bidding because these frequencies have been designated for use principally to provide for-profit service to subscribers.[127]

136. *800 MHz and 900 MHz Specialized Mobile Radio Systems (SMRs) (Subpart S of Part 90).* SMRs are radio systems in which licensees provide private land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz bands for compensation to subscribers who are themselves eligible to be licensed under Part 90 of the Commission's Rules, Federal Government entities, and individuals.[128] They are currently

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[120] *See* 47 U.S.C. § 158(g).

[121] *See, e.g.*, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 6185 (1991).

[122] Although lotteries for the issuance of 220 MHz Local licenses and, as discussed below, Commercial Nationwide licenses have already been held and licenses are being issued, it is possible that some licenses may not be awarded or will be canceled. In that event, we do not wish to incur substantial delays while we determine on the applicability of Section 309(j) to this class of service before accepting applications for and granting additional 220 MHz licenses. It is because of the uncertainty with respect to how 220 MHz Local licensees will actually conduct their businesses that we have not proposed to use competitive bidding immediately to award these licenses. By contrast, unserved area cellular applicants will utilize their licenses in the provision of service to subscribers for compensation.

[123] Both those who seek to provide services to subscribers for compensation as well as those who would use these channels purely for internal purposes are eligible to apply for 220 MHz licenses. *See* 47 C.F.R. § 90.703. Certain 220 MHz frequencies are reserved for public safety eligibles. These frequencies would not appear to be subject to competitive bidding in any event because they would not be principally used for the provision of service to subscribers for compensation and are specifically referenced in the legislative history, discussed above, as providers of "private services" that should not be subject to competitive bidding under the subject statute. *See* 47 C.F.R. § 90.720.

[124] Under this scenario, frequencies reserved for public safety purposes would be "private" for purposes of applying Section 309(j) and therefore would not be subject to competitive bidding. *Id.*

[125] 8 FCC Rcd at 4161-4162.

[126] *See* note 122, *supra*.

[127] *See* Report and Order, Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 6 FCC Rcd 2356 (1991). *See also* discussion of Interactive Video and Data Service, *supra*.

[128] 47 C.F.R. § 90.15.

classified under a separate subpart (Subpart S) of Part 90 of the Commission's Rules. Part 90, in turn, treats Private Land Mobile Radio Services (in the sense used by the Commission) generally. We believe that SMRs are different from most other licensees regulated under Part 90 because they are one of the few classes of licensees regulated by the Private Radio Bureau where it is explicitly contemplated and expected that licensees will provide service to subscribers for compensation.[129] We therefore analyze SMRs separately with respect to competitive bidding.

137. We believe it necessary to focus on the SMR industry now because it is an important industry that is currently undergoing significant change and development: the Commission has received many applications for wide area, high capacity SMR systems and is likely to receive more applications after the conclusion of certain ongoing Commission proceedings that could fundamentally alter the nature of the SMR regulatory climate.[130] Inasmuch as these decisions are imminent, it is imperative to the progress of the SMR industry that we determine quickly whether SMR licenses should be subject to competitive bidding.

138. Channels allotted for use by SMRs are intended to be used primarily for the purpose of offering service to subscribers.[131] SMR licensees usually are authorized exclusive use of channels, and thus SMR licensing in these bands may involve mutually exclusive applications.[132] Inasmuch as it is overwhelmingly likely that SMRs will provide service to subscribers for compensation, we propose to subject the 280 channel pairs at 800 MHz and the 200 channel pairs at 900 MHz available to SMRs under Part 90[133] of the Commission's Rules to competitive bidding.[134] We believe that applying a system of competitive bidding to SMRs would promote the objectives of Section 309(j)3).[135]

139. *General Category Channels and Intercategory Sharing* In addition to channels x5 set aside for SMRs, a substantial number of frequencies at 800 MHz have been allocated to eligibles for their internal use. Of these channels, 150 channel pairs in the 800 MHz band may be licensed for internal "private service" use as well as for use by SMRs. These frequencies are commonly referred to as General Category channels. Similarly, both SMRs and entities that provide public safety and other "private services," within the meaning of Section 309(j), may, under some circumstances, access frequencies normally allocated to other classes of users through intercategory sharing.[136] Mutually exclusive applications from such entities could conceivably be accepted for filing because the subject spectrum is usable by both the providers of "private services" and SMRs.[137] The legislative history of Section 309(j) states that most "private services" should not be subject to competitive bidding. Therefore, we do not believe it was Congress's intent that General Category frequencies or frequencies subject to intercategory sharing be subject to competitive bidding.[138] Furthermore, because this spectrum is not allocated principally for subscriber-based services (unlike the 220 MHz Commercial Nationwide band), the result here is distinguishable from the approach taken with some other services. In addition, we seek specific comment on whether competitive bidding should apply to mutually exclusive "finder's preference" applications.[139]

140. We also believe that requiring competitive bidding for all 800 MHz frequencies that could conceivably be used by SMRs through intercategory sharing or for all General Category channels would disserve the public interest. Such a result could see police departments, for example, having to bid against SMRs for access to 800 MHz frequencies. We do not believe that Congress contemplated this result. *See* H.R. Rep. No. 103-111 at 254. In addition, Section 309(j) requires the Commission to include safeguards to protect

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[129] *See* Subparts M and S, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988), *recon. den.*, 4 FCC Rcd 356, 359 (1989).

[130] *See, e.g.*, Notice of Proposed Rule Making, PR Docket No. 93-144, 8 FCC Rcd 3950 (1993); further Notice of Proposed Rule Making, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993). We will incorporate into the dockets of these proceedings any comments that are germane to competitive bidding.

[131] *See* Memorandum and Opinion, Docket No. 18262, *supra*.

[132] We note that the current Commission practice of utilizing waiting lists for SMRs almost always avoids potential mutually exclusive conflicts between applications for SMRs. Because nothing in Section 309(j) requires us to discontinue practices that avoid mutual exclusivity, this Notice does not reach the issue of waiting lists for SMRs. *See* 47 U.S.C. § 309(j)(6)(E); *see also* H. R. Rep. No. 103-111 at 258-259. We note, however, that the Commission has proposed to eliminate waiting lists in a separate proceeding. *See* Notice of Proposed Rule Making, PR Docket 93-144, 8 FCC Rcd 3950, para. 34 (1993).

[133] 47 C.F.R. § 90.617(d).

[134] We note that in PR Docket Nos. 93-144 and 89-553, we proposed changes that will increase the potential for mutually exclusive applications. In addition, we propose new types of licenses operating on SMR frequencies that, under Section 309(j) appear to be subject to competitive bidding. We request commenters to address whether a system of competitive bidding should be used to license wide-area SMRs in the 800 MHz and 900 MHz bands, and if so, how particular auction rules should be applied to those services.

[135] *See* para. 12. *See also, e.g.*, discussion of PCS, *supra*. We tentatively conclude that this analysis is applicable to the wide-area SMR systems proposed in PR Docket Nos. 93-144 and 89-553. We request specific comment on this conclusion that will be incorporated into the dockets of those proceedings.

[136] *See, e.g.*, 47 C.F.R. §§ 90.179 and 90.603 (eligibility of non-SMR Part 90 eligibles for licensing in the 806-824/851-869 MHz and 896-901/935-940 MHz bands); 47 C.F.R. § 90.621(g) (intercategory sharing of frequencies in the 806-821/851-866 MHz bands).

[137] In our experience, however, this has been a rare occurrence.

[138] H.R. Rep. No. 103-111 at 254.

[139] *See* 47 C.F.R. § 90.611(d). Under those rules, members of the public may submit to the Commission information that results in the takeback of SMR channels. Should those channels be taken back, the finder receives a dispositive preference with respect to those channels. We tentatively conclude that since a successful finder's preference is dispositive, there is no mutual exclusivity between the finder and the existing licensee and thus competitive bidding is inapplicable. We request comment, however, on the use of competitive bidding to resolve two or more finder's preference requests for the same channel or channels. We believe that our analysis for General Category frequencies and intercategory sharing would also apply to finder's preference applicants that operate in such spectrum (*e.g.*, if a public safety entity is one of two or more finder's preference requests for the same channel or channels, then under the above analysis the conflict (assuming *arguendo* that such a conflict would constitute mutual exclusivity) would be resolved by lottery rather than auction).

the public interest when identifying classes of licensees that are to be subject to 60 competitive bidding.[140] Therefore, where licensees who use their spectrum for private purposes and SMRs are both authorized to operate in certain segments of the 800 MHz band (either by applying for General Category frequencies or through intercategory sharing), we think that Section 309(j) contemplates the exclusion of those frequencies from competitive bidding in order to safeguard the public interest. Accordingly, we propose that, where mutually exclusive applications are accepted for filing from an SMR and a provider of private services, within the meaning of Section 309(j), lotteries, rather than competitive bidding, would apply.

141. As discussed above, Section 309(j)(4)(D) directs the Commission to ensure that certain designated entities are ensured the opportunity to participate in the provision of spectrum under a system of competitive bidding. In the context of 800 MHz and 900 MHz SMRs, we propose to apply the general scheme of preferences discussed above for services other than broadband PCS. We request that commenters specifically address such proposals in the specific context of SMRs. In addition, commenters should also specifically address our proposed auction methodologies in the context of SMRs.[141]

Part 95 - Personal Radio Services.

142. *Interactive Video and Data Service (IVDS) (Subpart F of Part 95).* IVDS is a new radio service that provides the capability for two-way interaction with commercial and educational television programming as well as with informational and data services that may be delivered by broadcast television, cable television, wireless cable, direct broadcast satellite, or any future television or data delivery methods. The IVDS licensee is, therefore, a private short distance communications service provider for subscribers located at fixed locations in a service area.[142]

143. Under the IVDS rules, only two IVDS licensees may serve a particular service area or market.[143] The use of the IVDS spectrum may involve mutually exclusive applications because an IVDS licensee is assigned the exclusive right to use one specific frequency segment in a particular market.[144] Because IVDS was expressly established as a subscriber-based commercial service,[145] the principal use of IVDS-allocated spectrum is reasonably likely to involve the licensee receiving compensation from subscribers for communications services.[146] Therefore, as a subscriber-based commercial service, IVDS is not a "private" service within the meaning of Section 309(j). While governmental and educational entities are eligible under the IVDS rules and policies,[147] their participation as licensees does not affect the substantive pecuniary character of the service.[148] When Congress enacted the exception that permits lotteries for applications accepted for filing prior to July 26, 1993, the legislative history stated that this provision was enacted in order to allow the first nine IVDS markets to go to lottery.[149] Congress thus clearly envisioned that, absent the exception for grandfathered IVDS applicants, competitive bidding would apply to IVDS. Consistent with this evidence of Congressional intent, we also believe that applying a system of competitive bidding to IVDS would promote the objectives described in 47 U.S.C. § 309(j)(3). Accordingly, we propose to subject IVDS to competitive bidding.[150] [151]

144. In addition, in order to ensure that certain designated entities are ensured the opportunity to participate in the provision of IVDS spectrum under a system of competitive bidding, we propose to apply the general scheme of preferences discussed above for services other than broadband PCS. Commenters should specifically address such proposals discussed above in the specific context of IVDS. Further, commenters should also specifically address our proposed auction methodologies in the context of IVDS.

Other Private Radio Services or Subservice Categories.

145. Although not as pressing as with SMRs and IVDS, we seek service-specific comments concerning whether mutually exclusive applications seeking to provide service to subscribers for compensation in the following private radio services or subservice classifications should be subject to

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[140] 47 U.S.C. § 309(j)(3).

[141] Because we tentatively conclude that our analysis for SMRs would apply to the wide-area SMRs proposed in PR Docket Nos. 93-144 and 89-553, commenters should also specifically address preferential measures and auction methodologies for the proposed systems that would be incorporated into the dockets of such proceedings.

[142] 47 C.F.R. § 95.803(a).

[143] 47 C.F.R § 95.803(b).

[144] In response to the opening of three filing windows for nine service areas, we received approximately 4,100 IVDS applications for licenses.

[145] *See* 47 C.F.R. §§ 95.803(a) and 95.805(d). *See also* Report and Order, GEN Docket 91-2, 7 FCC Rcd 1630 (1992).

[146] *See, e.g.,* 47 C.F.R. § 95.805(d) (noting that "[t]he licensee may use the IVDS system to interact with *its subscribers* concerning products and services offered, polls conducted, educational classes taught, and other activities in conjunction with video and data delivery systems.") (Emphasis added).

[147] *See* Second Memorandum Opinion and Order, PR Docket 91-2, 8 FCC Rcd 2787 (1993) (clarifying that governmental and educational entities are eligible for IVDS licenses).

[148] The eligibility of governmental and educational entities for IVDS is analogous to the ability of such entities to invest in other commercial ventures, such as real estate or the stock market. The participation of such entities in a commercial venture does not transform the substantive character of the commercial venture. With this in mind, we note that Congress rejected a provision in the Senate Bill that would have exempted state and local governmental entities from competitive bidding generally. *See* Conf. Rep. at 481. Therefore, we do not believe that Congress intended to exempt any IVDS licensees from competitive bidding on the basis of such status.

[149] *See* Conference Report at 498 (stating that the exception that allows the Commission to proceed with a system of random selection for applications accepted for filing prior to July 26, 1993, was enacted to "permit the Commission to conduct lotteries for the nine [IVDS] markets for which applications have already been accepted").

[150] This proposal does not apply to the first nine IVDS markets. Applications for the first nine IVDS markets were accepted for filing prior to July 26, 1993, and the Commission conducted a lottery for those markets on September 15, 1993.

[151] In light of the above analysis, we propose that because it is "reasonably likely" that IVDS would involve licensees providing communications services to subscribers for Section 309(j)(A) purposes, IVDS would be subject to competitive bidding even if some individual licensees, at their option, choose not to receive compensation from their own subscribers.

competitive bidding under Section 309(j). Comments that narrowly focus on this issue may serve as a record for future Commission actions concerning the application of competitive bidding to such services. These private radio services would include the following: 9 (1) Private Carrier Paging,[152] (2) Automatic Vehicle Monitoring[153] (3) Public Coast and Alaska-Public Fixed Stations, (4) Aeronautical En Route and Fixed Stations, (5) Private Land Mobile Radio Service (PLMRS) entities operating at 470-512 MHz,[154] and (6) the following Private Operational-Fixed Microwave Services: (a) the Multiple Address Service, (b) Digital Termination Systems, (c) 18 GHz Video Entertainment Channels, and (d) the Digital Message service. We request comment on whether other private radio services or categories of services should be subject to competitive bidding.

146. In addition, we propose to exclude all other private radio services from competitive bidding because they do not meet the criteria established by Section 309(j). Because aircraft and ship radio stations, for example, operate on shared spectrum, there can be no mutual exclusivity. Similarly, private land mobile stations below 800 MHz operate on shared spectrum as well.[155] Therefore, we propose to also exclude such private land mobile spectrum as well as aircraft and ship stations from competitive bidding. The classes of services that would be excluded from competitive bidding under our proposal because, *inter alia*, they do not appear to be primarily providers of communications services to subscribers appears to include: (1) Microwave Stations in the POFS not referenced above,[156] (2) Alaska-Private Fixed Stations, (3) the Citizens Band Service, (4) the Radio Control Service, (5) the General Mobile Radio Service, (6) the Amateur Radio Service,(7) the following Marine Stations: a) Marine Support Stations, (b) Marine Operational Fixed Stations, (c) Marine Stations in the Radiodetermination Service, (8) Non-SMR licensees above 800 MHz,[157] (9) Multiple Licensed Systems below 800 MHz, (10) PLMRS under 470 MHz,[158] and (11) the following aviation stations: (a) Flight Test Stations, (b) Aviation Support Stations, (c) Aeronautical Utility Mobile Stations, (d) Aeronautical Search and Rescue Stations, (e) Emergency Aviation Communications, (f) Airport Control Tower Stations, (g) Aviation and Marine Operational Fixed Stations, (h) Aviation and Marine Stations in the Radiodetermination Service, (i) Civil Air Patrol Stations, (j) Aeronautical Automatic Weather Observation Stations, (k) Aeronautical Advisory Stations (Unicoms), and (l) Aeronautical Multicom Stations. We seek comment on whether any of the above services or classes of service,[159] are more appropriately included in the competitive bidding process, however.

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[152] As a subscriber-based service, PCP appears to meet the statutory criteria for competitive bidding. At present, however, PCP frequencies are assigned on a non-exclusive basis, and therefore do not give rise to mutually exclusive applications. We nevertheless seek comment on whether competitive bidding could be required in the future if we end non-exclusive assignment of PCP frequencies. In a pending proceeding, we have proposed to allow exclusive frequency assignments for qualified systems on 35 of the 40 private paging frequencies at 929-930 MHz. *See* Notice of Proposed Rule Making, PR Docket No. 93-35, 8 FCC Rcd 2227 (1993). With this in mind, we tentatively conclude that if mutually exclusive applications occur, we would use competitive bidding to select a licensee. We seek comment on what procedures would best facilitate the licensing process.

[153] We will delay action on the applicability of competitive bidding to this service because certain fundamental questions about the nature of this service are now being considered in a separate proceeding. *See* Notice of Proposed Rule Making, Amendment of Part 90 of the Commission's Rules to Adopt Regulations for the Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, 8 FCC Rcd 2502 (1993). A decision on some of these issues (*e.g.*, whether exclusive AVM channels will be prescribed) could moot the issue of whether these channels should be subject to competitive bidding. In addition, it appears that because AVM frequencies are shared with the government, which is primary in this band, the principal use of these frequencies might not be for the provision of service to subscribers for compensation, as contemplated by Section 309(j). We request comment on our tentative conclusion.

[154] Mutually exclusive applications by entities offering service to subscribers for compensation could occur because assignments in this band can be exclusive. Because the primary use of these frequencies at 470-512 MHz is by licensees who must share them, we do not believe that this band would be primarily used for the provision of service to subscribers. *Cf.* Notice of Proposed Rule Making, PR Docket No. 92-235, 7 FCC Rcd 8105 ("Refarming") (1992). We request comment on our tentative conclusion.

[155] As noted above, however, a limited number of private land mobile radio licensees at 470-512 MHz have achieved channel exclusivity by loading sufficient mobiles on their channels.

[156] We note that in this service's spectrum, there could be both service to subscribers for compensation as well as "private" use (within the meaning of the legislative history of Section 309(j). In our analysis of 800 MHz General Category channels, we tentatively decided to exclude those channels from competitive bidding because to do so would be contrary to Congress's expectations that virtually all private services would continue to be licensed as before. Therefore, we propose that POFS spectrum would not be subject to competitive bidding. We also believe that the POFS is exempt from competitive bidding because the principal use of the spectrum is for non-subscriber services. We seek specific comment on these matters. There are also a substantial number of mutually exclusive Multiple Address Service applications pending before the Commission which were filed prior to July 26, 1993. A substantial number of these applications were filed by federal government applicants as well as by applicants who would use these frequencies for "private service." Because we cannot be certain that the principal use of these frequencies is reasonably likely to involve the provision of service to subscribers, we tentatively conclude that these particular applications should not be subject to competitive bidding but request comment on our conclusion.

[157] Because our rules only permit not-for-profit cooperative sharing, as, for example, when several power companies share a single 800 MHz trunked system in the Power Radio Service, it appears that such systems do not have subscribers and are ineligible for competitive bidding under Section 309(j). Therefore, these types of frequencies, although exclusively assigned, should not be subject to competitive bidding. *See* 47 C.F.R. § 90.179, In re Subparts M and S, PR Docket No. 86-404, *supra*. We request comment on our tentative conclusion.

[158] PLMRS entities operating below 470 MHz (with the exception of 220 MHz providers, which are treated separately above) operate on shared spectrum, and therefore, there can be no mutual exclusivity among applications.

[159] We also note that in the majority of cases, the listed stations operate on shared spectrum, and therefore there can be no mutual exclusivity.

C. Common Carrier Radio Services

147. We propose to subject each of the common carrier radio services described below to competitive bidding and to employ the auction design procedures proposed in Part III above in licensing those services.[160] In each case, we believe that a competitive bidding system would promote the objectives of Section 309(j) of the Communications Act. We request that parties provide comment on whether each of these services should be subject to competitive bidding, specifically explaining the reasons for their conclusions with respect to each service. In addition, parties should address the merits of using the general auction procedures proposed in Part III to license each service. We also request parties to comment, on a service-specific basis, on whether other common carrier radio services should be subject to competitive bidding according to the Budget Act's criteria.

148. *Multipoint Distribution Service (MDS).* MDS is a one-way domestic public radio service rendered on microwave frequencies from a fixed station transmitting (usually in an omnidirectional pattern) to multiple receiving facilities located at fixed points. MDS includes both single-channel and multichannel stations.[161]

149. We note that MDS applications were accepted for filing prior to July 26, 1993. Therefore, under the Budget Act, such mutually exclusive applications may be resolved by lottery rather than auction. We tentatively conclude that it would better serve the public interest to lottery, the pre-July 26, 1993, MDS applications rather than subject them to competitive bidding to avoid further delay in granting MDS licenses. Those applications have already incurred substantial delays. To auction those licenses would further delay delivery of MDS service to the public because the auction rules will not be in effect for several months. We request comment on whether the Commission should auction, rather than lottery, the MDS applications accepted for filing prior to July 26, 1993.

150. *Multichannel Multipoint Distribution Service (MMDS).* MMDS consists of those multipoint distribution service channels that use the frequency band 2596 MHz to 2644 MHz (E-group and F-group channels) and associated response channels. MMDS is typically used to provide video entertainment programming to subscribers.[162] *See* note 5, *supra.*

151. We note that a significant number of MMDS applications were accepted for filing prior to July 26, 1993. Therefore, under the Budget Act, such mutually exclusive applications may be resolved by lottery rather than auction. We tentatively conclude that it would better serve the public interest to lottery the pre-July 26, 1993, MMDS applications, rather than subject them to competitive bidding to avoid further delay in granting MMDS licenses. Those applications already were subject to a freeze, and thus delayed. To auction those licenses would further delay delivery of MMDS service to the public because the auction rules will not be in effect for several months. We request comment on whether the Commission should auction, rather than lottery, the MMDS applications accepted for filing prior to July 26, 1993.

152. *Local Multipoint Distribution Service (LMDS).* LMDS is a proposed new service in a portion of the Ka-band (27.5-30.0 GHz) to provide a wide array of broadband terrestrial services, including multipoint video programming distribution, video telecommunications, and data services.[163]

153. *Fixed Satellite Services.* The fixed-satellite service uses radio transmissions between authorized satellite space stations and fixed earth stations for common carrier and non-common carrier communications.[164]

154. *Mobile Satellite Service (MSS) Above 1 GHz.* MSS consists of proposed satellite systems that will offer a range of voice and data mobile services in the 1610-1626.5/2483.5-2500 MHz (1.6/2.4 GHz) frequency bands. These services include two-way messaging service with interconnection to the public switched network, paging, facsimile and data messaging, and fleet surveillance and control services.

155. We note that a significant number of MSS applications above 1 GHz were accepted for filing prior to July 26, 1993. Therefore, under the Budget Act, such mutually exclusive applications may be resolved by either auction or lottery. We request comment on whether the Commission should auction, rather than lottery, the MSS applications accepted for filing prior to July 26, 1993.

156. *Mobile Satellite Service (MSS) Below 1 GHz.* MSS below 1 GHz includes non-voice, non-geo-stationary (NVNG) service. The NVNG service will offer an array of position location and data communication mobile satellite services utilizing non-geostationary satellite constellations. While current NVNG applications do not appear to be mutually exclusive, it is possible that mutually exclusive applications may be filed in the future. In the event that mutually exclusive applications are filed, we propose to subject the NVNG service to competitive bidding.

157. *Point-to-Point Microwave Radio Service.* Point-to-point microwave radio is a domestic public radio service rendered on microwave frequencies by fixed stations between points that lie within the United States, or between points to its possessions, or to points in Canada or Mexico. Point-to-point microwave has traditionally been used for basic telephone network services (voice, data, and video traffic), but more recently has often been != used to interconnect cells of a cellular system.[165]

158. *Cellular Services.* Cellular services, which are governed under Part 22 of the Commissions Rules, operate by dividing a large geographical service area into cells and assigning the same frequencies to multiple, nonadjacent cells. As a subscriber travels across the service area the call

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[160] We recognize that some licensees in these services are permitted to operate on a non-common carrier basis. *See, e.g.,* 47 C.F.R. § 21.900. Nevertheless, all initial applications in such services that satisfy the Budget Act's competitive bidding criteria would be subject to auctions.

[161] *See* 47 C.F.R. §§ 21.900-21.915 of the Commission's Rules concerning Multipoint Distribution Service.

[162] *See id.*

[163] *See* Rule Making to Amend Parts 1 and 22 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, CC Docket No. 92-297, 8 FCC Rcd 557 (1993).

[164] *See* 47 C.F.R. Part 25 of the Commission's Rules concerning Satellite Communications.

[165] *See* 47 C.F.R. §§ 21.700-21.711 of the Commission's Rules concerning the Point-to-Point Microwave Radio Service.

is transferred from one cell to another without noticeable interruption. Each cell is served by its own radio telephone and control equipment at a cell-site. All the cells in a system are connected to a Mobile Telephone Switching Office (MTSO) which, in turn, controls the switching between the Public Switched Telephone Network (PSTN) and the cell site.

159. The U.S. and its possessions were divided into 734 cellular markets: 305 Metropolitan Statistical Areas (MSAs), 428 Rural Service Areas (RSAs), and the Gulf of Mexico Statistical Area (GMSA). Two cellular systems are licensed in each market on separate frequency blocks. Each initial cellular licensee in the MSAs and RSAs was given five years from the date of initial authorization to build and expand its system within its market.[166] The geographic area not covered by the licensee on each frequency block in each market is considered "unserved area." The Commission recently completed rules for accepting and processing applications for these unserved areas.[167]

160. Approximately 10,000 unserved area applications were filed between March 10 and May 12, 1993; of these, approximately 9,000 mutually exclusive applications were filed for 83 systems.[168] Given the large number of applications filed prior to July 26, 1993 and the criteria described in Section 309(j), the Commission has the option of allowing these unserved area applications to be resolved by auction rather than by lottery. *See* Section 6002(c) (Special Rule). We believe that auctions for these pending applications would meet the statutory objectives. For example, the rapid deployment of new service, especially to rural areas, would be accomplished because insincere applicants who do not intend to build out their proposed systems but, rather, assign their authorization for profit, would be discouraged from competing in an auction. In addition, under some of the auction procedures proposed herein, auctions would provide more opportunity for a wider variety of applicants to become cellular licensees. Thus, we propose to auction, rather than lottery, unserved area applications filed prior to July 26, 1993 and seek comment on this proposal. We further propose to limit the opportunity to enter the auction for the unserved areas to those applicants who filed prior to July 26, 1993, and request comment on this approach. We also ask whether the Commission should allow full market settlements in these markets pending the decision of lottery or auction.[169]

161. *Public Paging Services.* Public paging services are radio services in which common carriers are authorized to offer and provide paging service for hire to the general public. Paging service is the transmission of brief coded radio signals for the purpose of activating specific pagers; such transmissions may include brief messages and/or sounds.[170]

162. *Air-Ground Services.* Air-ground services are radio services in which common carriers are authorized to offer and provide radio telecommunications services for hire to subscribers in aircraft.[171]

163. *Public Radiotelephone Services.* Public radiotelephone services are radio services in which common carriers are authorized to offer and provide radiotelephone service for hire to the general public. Radiotelephone service generally is the transmission of sound from one place to another by means of radio, but in this context it refers to interconnection with the public telephone network in order to provide mobile telephone service. Common carrier radiotelephone services are either manual (operator assisted -- provided in the high VHF 152-159 MHz spectrum) or automatic trunked (user-dialed -- provided in the low UHF 454-459 MHz spectrum). The latter is sometimes called Improved Mobile Telephone Service or IMTS.[172]

164. *Offshore Services.* Offshore services are radio services in which common carriers are authorized to offer and provide radio telecommunication services for hire to subscribers on structures in the offshore coastal waters of the Gulf of Mexico.[173]

165. *Rural Radio Services, including Basic Exchange Telephone Radio Systems (BETRS).* Rural services are radio services in which common carriers are authorized to offer and provide radio telecommunication services for hire to subscribers in areas where it is not feasible to provide communication services by wire or other means. Rural services are either conventional rural radio services (provided in the VHF and UHF mobile spectrum), in which subscribers are essentially allowed to install and operate mobile telephone equipment at a fixed location for the purpose of obtaining interconnected service, or Basic Exchange Telephone Radio Systems (BETRS), in which a multiplexed digital radio link is used as the last segment of the local loop.[174]

166. We seek comment on whether each of the radio services described above satisfies the criteria of the Budget Act for services subject to competitive bidding,[175] and whether competitive bidding for these services would promote the objectives specified in section 309(j)(3) of the

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[166] Rules for Rural Cellular Service, Second Report and Order, 2 FCC Rcd 2306 (1987), recon., 4 FCC Rcd 5377 (1989).

[167] Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing Applications for Unserved Areas in the Cellular Service, 6 FCC Rcd 6185 (1991), Second Report and Order, 7 FCC Rcd 2449 (1992), Third Report and Order, 7 FCC Rcd 7183 (1992), recon., 8 FCC Rcd 947 (1993).

[168] The Commission had scheduled two lotteries for some of these applications but subsequently postponed them pending evaluation of the provisions of the Budget Act and competitive bidding. *See* Lottery Notice, Mimeo No. 34917, Sept. 16, 1993.

[169] *See* discussion of prohibition of collusion, *supra*, at paras. 93-94.

[170] *See* 47 C.F.R. §§ 22.500-22.527 of the Commission's Rules governing Public Land Mobile Service.

[171] *See* 47 C.F.R. §§ 22.1100-22.1121 of the Commission's Rules on 800 MHz Air-Ground Radiotelephone Service. *See also* 47 C.F.R. §§ 22.521-22.523 of the Commission's Rules governing 454-459 MHz air-ground stations.

[172] *See* 47 C.F.R. §§ 22.500-22.527 of the Commission's Rules concerning Public Land Mobile Service.

[173] *See* 47 C.F.R. §§ 22.1000-22.1008 of the Commission's Rules concerning Offshore Radio Service Telecommunications Service.

[174] *See* 47 C.F.R. §§ 22.600-22.610. Although we do not anticipate mutually exclusive applications for BETRS, provision of which is limited to local exchange carriers, BETRS uses the same channels as paging services, and therefore, there may be mutually exclusive applications seeking to use spectrum for both BETRS and paging.

[175] *See* para. 2, *supra*.

Act.[176] We also seek comment on whether any safeguards to protect the public interest in the use of the spectrum would be appropriate with respect to particular services.[177]

V. Summary of Proposed Auction Procedures

167. We sketch out below how either an oral or a sealed bid auction might be conducted and seek comment on our proposed procedures. We anticipate that the Commission will engage an outside consultant or consultants to help the Commission conduct the auction process. These persons, who together with required Commission staff (hereinafter jointly referred to as the "Responsible Officials"), would prepare a Public Notice or Notices that would announce the particulars of upcoming auctions. We propose that there be a minimum of 90 days notice of each such auction.[178] The Public Notice would set forth what is to be auctioned, the time, place, and kind (*e.g.*, oral vs. sealed bid) of auction that is to be held, the deposit requirements for that auction or auctions, including the amount of the upfront payment that the bidder must tender in advance to the Commission or bring with him or her to the auction to be allowed to bid, the address to which the application and related materials (including the sealed bid if the auction is a sealed bid auction) should be sent, as well as other identifying documents, the deadline for submission of applications, and any other relevant information.

168. At the same time that the Responsible Officials announce an upcoming filing window for an auction service by Public Notice, they would also indicate the availability of a bid package to interested parties. The bid package would identify the specific steps to be taken if the recipient wished to participate in the upcoming auction, including the filing of short-form and long-form applications with the Commission.[179] If the recipient wished to apply and participate in the auction, we propose that it file the applications (and any applicable fee) as provided in the Public Notice and register to bid at the same time by including written notice of the recipient's intention to bid. The short and long form applications and a proposed Notice of Intention to Bid (NIB)[180] would be sent to an address designated by the Responsible Officials to be received no later than a date indicated in the announcement.[181] We propose that date would be at least 60 days prior to the auction date.

169. The NIB should indicate clearly on the top of the first page the auction to which the NIB relates. As suggested above, we propose that only one sealed bid per bidding party would A be allowed in a sealed bid auction,[182] and each auction should have a separate sealed bid.[183] As part of the NIB, the prospective bidder would also provide to the Responsible Officials the name of the person who will be bidding on behalf of the applicant, if the applicant did not intend to bid personally.[184]

170. The Responsible Officials would review the short-form application and associated documents to ensure that the application was acceptable for filing.[185] Application fee checks would be deposited immediately. We would use existing rules to determine whether to return fees in the event that applications are not acceptable for filing.[186]

171. If the Responsible Officials determine after review of the short-form applications that more than one application is acceptable for filing and the prospective bidders are qualified to bid, they would so announce in a Public Notice issued at least 45 days prior to the auction.[187] The Responsible Officials might hold a preauction conference B (at which bidder attendance would be voluntary) if they deemed it necessary. On the day of the auction, the bidder

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176 *See* para. 3, *supra*.

177 *See* para. 4, *supra*, and Section 309(j)(3).

178 In order to meet our statutory deadline to commence issuing PCS licenses and permits, we may adopt an expedited schedule for our initial PCS auctions. We seek comment on the absolute minimum necessary notice of an upcoming auction.

179 We seek comment on whether the burden of storing applications might make it appropriate to require long-form applications to be filed on microfiche, as is done in the case of cellular applications.

180 We propose to permit applicants to submit NIBs in letter form pending adoption and approval of the new form.

181 Applications and NIBs that were received after the deadline would be returned.

182 We propose that anyone found to have submitted more than one bid for a single sealed bid auction be immediately disqualified from that auction and possibly from all future auctions as well. We request comment on this prophylactic measure.

183 In the case of a group bid, of course, there could be more than one bid per auction: the group bid and a single sealed or oral bid for each individual license on which the bidder wished to bid.

184 We propose that information on the identity of the bidder's agents not be made routinely available to the public. *See* 47 C.F.R. § 0.457(d). Some bidders' strategies may depend on bidding through different agents in different auctions.

185 We have proposed that short-form applications be required to meet a letter-perfect standard in order to be accepted for filing and qualify the applicant to bid. We recognize that applicants may petition the staff for reconsideration and subsequently seek review of any action returning an application as not acceptable for filing. We propose to rule on all petitions for reconsideration prior to the relevant auction. In the event that the staff's denial of a petition is appealed, unless the full Commission has denied the appeal, the appellant will be permitted to participate conditionally in the auction. If the staff grants a petition for reconsideration, the applicant may participate notwithstanding a pending application for review filed by any other person. We propose to err on the side of leniency and allow, so much as possible, potential bidders to bid. If and when that bidder should win the auction, however, its application would be subject to further Commission review and perhaps to petitions to de - as well. Since we plan to keep the bidder's deposit if the petition to deny is successful or the winning bidder is otherwise found to be unqualified, the incidence of frivolous or ill-considered applications should be minimized. We request comment on this procedure and on any alternative procedures we might use when decisions concerning acceptability of applications are challenged.

186 *See* 47 C.F.R. § 1.1101, *et. seq.*, and n.90, *infra*.

187 This would provide parties whose applications were not accepted for filing 30 days to file petitions for reconsideration and provide time for these petitions to be processed prior to the auction. We seek comment on whether, in the context of auctions only, we should shorten t' from 30 to 15 days the period within which such petitions for reconsideration may be filed. If we were to do so, then we would propose to announce auctions 75 days in advance, require applications to be submitted 45 days in advance, and issue the Public Notice listing qualified bidders 30 days in advance. *Cf.* paras. 167-169 and note 185, *infra*. If only one or no applications are acceptable for filing, the auction would be cancelled, absent a subsequent reconsideration action; *see* note 91, *infra*.

or its agent(s)[188] would appear at the auction room at least two hours prior to the auction, exhibit the applicant's notice from the Commission that its application is acceptable for filing and provide photographic identification of the party that will actually be bidding. If satisfied, the Responsible Officials would allow the bidders to enter that section of the auction room reserved for prequalified bidders.[189] Those bidders and those bidders only would receive a bidding paddle so that they could bid.

172. The Responsible Officials would conduct an oral auction in accordance with the procedures proposed earlier. The auction would be videotaped and open to the public, although only prequalified bidders could bid. Under our preferred option, bidders would have already tendered their upfront payments to the Commission. If, however, we do not require bidders to tender their upfronts payments in advance, the high bidder would be required to turn over its upfront payment immediately after determination of the high bid for that particular license. If the Commission concludes that it is appropriate and practical to require immediate tender of an additional payment equal to the difference between 20 percent of the high bid and the upfront payment, the Responsible Officials would collect that payment, declare the high bidder the auction winner, and conclude the auction. We seek comment on the appropriate form of the additional payment. It should be in a form that is quickly transferrable and of high reliability (*e.g.*, an additional cashier's check or checks, or perhaps, in the future, an electronic funds transfer). Failure to provide the full deposit at the auction would result in dismissal of the winner's relevant application(s) and the auctioneer would reopen the bidding to all remaining auction participants. The high bidder determined by this process who tenders the requisite upfront and deposit payments is the auction winner. The winner's payment(s) made at the auction would be immediately deposited. Once the winner's deposit has been verified, the Commission would then refund (without interest) the upfront payments of the other bidders. The Commission would then issue a Public Notice announcing the winner(s) of the auction(s) and would send a letter to the winner announcing its status as tentative winner of the license.

173. A sealed bid auction would function similarly to the oral bidding process described above with the following differences. First, a sealed bid envelope submitted shortly before the auction would contain a written statement of the amount bid for that auction. *See* para. 108, *infra*, where we propose to require submission of bids five days prior to the auction. We seek comment on where the sealed bid envelopes should be kept prior to the auction. Second, on the day of the auction, instead of having oral bids, the auctioneer would open the sealed envelopes in public, with the entire proceeding videotaped. Prior to the opening of any bids, bidders would have the opportunity to withdraw from the auction without penalty. At least two witnesses would observe the auctioneer opening the bid envelopes and would verify the amount of the various bids, all of which would be posted publicly.[190] The auctioneer would announce the name of the high bidder and the amount bid. At that point, the high bidder would have to tender its 20 percent deposit to the Commission,[191] or suffer dismissal, in which case the Commission would keep the high bidder's upfront payment if it had already been tendered and select the second highest bidder.[192]

174. The Commission would then review the entire application submitted by the auction winner. The application will be processed in accordance with normal rules applicable to the service under which the application was filed.[193] These would include, where applicable, the filing of petitions to deny against the auction winner.[194] As noted above, if the Commission were unable to grant the auction winner's application, the government would nonetheless retain the winner's deposit.

175. If the Commission granted the application, the grant would be conditioned upon the winning bidder providing, within a short period, such as 41 days,[195] a payment, via cashier's check[196] in an amount equal to the difference between the winning bid and the deposit.[197] Failure to comply with this deadline would result in automatic dis-

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[188] We envision, and propose, that bidders be allowed to bid through multiple bidding agents, although only one agent may bid for a single bidder in each auction. Each bidder or its agent, however, and his or her associated bid, if a sealed bid auction, must have been qualified by the Responsible Officials.

[189] Although our preferred option, as described in paras. 102-109, is for bidders to tender their upfront payments in advance to the Commission, we also seek comment on only requiring bidders to exhibit their upfront payment cashier's checks when they arrive for the auction. Should we adopt this procedure, the Responsible Officials would examine but not collect the upfront payment checks prior to admitting bidders to the auction premises. Because validation of the upfront payment is a critical step in the bidding process, we propose to employ third party auditors to verify the fairness and accuracy of this process, at least in the beginning. If these upfront payments were received and deposited earlier, there would be no need to show these checks.

[190] As an alternative, we seek comment on whether to disclose only the two highest bids outstanding at any given time.

[191] As described above, under our preferred option, bidders would have already tendered an upfront payment to the Commission, so the payment due from the high bidder at auction time would be the difference between 20 percent of the high bid and the upfront payment.

[192] *See* paras. 120, 123-124 for a discussion of procedures for combinatorial bidding.

[193] *See* paras. 97, 100, *supra*. We seek comment on whether any of our normal processing rules should be modified in the context of auctions. For example, do any services have letter perfect standards that may be inappropriate for the long-form applications in this context

[194] *See* paras. 110-112, *supra* for our discussion of alternative petition to deny filing schedules. We anticipate that this will be the point at which a licensee's qualifications or bona fides would be subject to review and challenge. *See also* H. R. Rep. No. 103-111 at 258.

[195] Parties may file petitions for reconsideration of a license grant or appeal to the courts or the Commission may on its own motion reconsider the grant of an application within 30 days after grant. *See* 47 C.F.R. §§ 1.106, 1.108; 47 U.S.C. § 402. If license grants are made under delegated authority, the Commission may review such grants on its own motion, 47 C.F.R. § 1.117, and applications for review may be filed.

[196] In addition, in the future, we may permit electronic funds transfers for such payments.

[197] A smaller or no payment would be due at this time by entities using installment payments.

missal of the application with loss of the deposit.[198] Petitions for reconsideration or applications for review of a license grant would not stay the granting of the license. If on review, however, the court reversed the grant of the license, the bid amount less any upfront payment and deposit would be returned to the applicant. Alternatively, we ask whether there might be circumstances where the Commission would be required to return the full amount of the bid, including the deposit and upfront payment.[199] We seek comment on this procedure.

CONCLUSION

176. With this rule making, we enter new and uncharted territory. We believe that the competitive bidding process has the potential to improve significantly on the ways in which the Commission has formerly awarded licenses, but only if conducted skillfully and well. Due in part to the extremely short time within which the Commission must implement this complex legislation, it is unlikely that we have been able to propose a solution to or even foresee every possible problem or issue that could arise in the competitive bidding process. For that reason, it is more important than usual that commenters give serious and thoughtful consideration to the issues we have raised and to bring to our attention those which we may have overlooked.

Regulatory Flexibility Act

177. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this *Notice of Proposed Rule Making*. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

Ex Parte Rules - Non-Restricted Proceeding

178. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

179. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47. C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before November 10, 1993, and reply comments on or before November 24, 1993.[200] To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the F.C.C. Reference Center of the Federal Communications Commission, room 239, 1919 M Street, N.W., Washington, DC 20554. The complete text of the *Notice* may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, Room 236, Washington, D.C. 20554, telephone (202) 857-3800.

Ordering Clause

180. Issuance of this *Notice of Proposed Rule Making* is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, and Sections 4(i), 309(i), 303(j), and 309(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(i), 303(j), and 309(r).

Contact Persons

181. For further information concerning this proceeding, contact Toni Simmons, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[198] We also seek comment on whether, rather than automatic dismissal of the application, the Commission should retain some discretion in this area.

[199] The Commission currently is unable to pay interest on upfront payments or deposits. *See* note 100, *supra*.

[200] In order to be considered in this proceeding, all previously filed comments regarding auctions should be resubmitted. In addition, all previously filed petitions for rule making concerning competitive bidding that the petitioners believe have not been mooted by this proceeding should be refiled in order to be considered.

APPENDIX

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IFRA) of the expected impact on small entities of the proposals contained in this NPRM. We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IFRA and must be filed by the comment deadlines provided above.

A. Reason for Action.

(i). This rule making proceeding is initiated to obtain comment regarding the implementation of a new Sections 309(i) and 309(j) of the Communications Act, as amended by the Omnibus Budget Reconciliation Act of 1993 (Budget Act).

B. Objectives.

(ii). The Commission seeks to implement changes to the Communications Act that, *inter alia*, provide the Commission with the authority to conduct auctions of electromagnetic spectrum, limit the Commission's authority to conduct lotteries and require certain anti-trafficking requirements in the context of lotteries. The Budget Act requires the Commission to complete this proceeding within 210 days of its enactment, or March 8, 1993.

C. Legal Basis.

(iii). The NPRM is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, and Sections 2(a), 4(i), 303(r), 309(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303(r), 309(i) and 309(j).

D. Reporting, Recordkeeping and Other Compliance Requirements.

(iv). The proposals under consideration in this NPRM include the possibility of new reporting and recordkeeping requirements for a number of small business entities.

E. Federal Rules Which Overlap, Duplicate or Conflict With These Rules.

(v). None.

F. Description, Potential Impact, and Number of Small Entities Involved.

(vi). The rule changes proposed in this proceeding could affect small businesses if they have mutually exclusive applications for initial licenses or permits for a particular radio service accepted for filing by the Commission where the Commission has determined that, under Section 309(j), the particular spectrum is subject to competitive bidding. The NPRM proposes that mutually exclusive applications for licenses or permits in such radio services would be resolved by a system of competitive bidding rather than a system of random selection. In addition, the NPRM proposes certain antitrafficking requirements in the context of lotteries. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

(vii). The NPRM proposes certain mechanisms of preferential treatment for small businesses, among other entities, to ensure economic opportunity, such as favorable financing or tax certificates.

Separate Statement of Commissioner Andrew C. Barrett

Re: Implementation of Section 309(j) of the Communications Act: Competitive Bidding.

This comprehensive notice of proposed rulemaking develops a variety of options for licensing commercial mobile services through competitive bidding. By necessity, the item must address the various intricacies and complexities of conducting an auction for various classes of commercial mobile services. I believe this Notice raises the proper questions in order to develop a full record for rules that will govern the competitive bidding of commercial mobile licenses. The questions in this notice highlight the interrelationship between implementing a competitive bidding scheme and fulfilling important public policy objectives under the Communications Act. I write separately to express my concern over the additional overlay of complexity contemplated by this item with respect to Personal Communications Services (PCS). Specifically, I am concerned about two aspects of this Notice as it pertains to PCS.

First, the item contemplates various schemes that are likely to enhance market aggregation schemes through group bidding. I am in favor of group bidding that could aggregate MTA's into nationwide licenses. Whether as a part of a consortia, or as individual entities bidding for an MTA license, the players in this context are likely to be equipped with sufficient resources. Thus my concern with respect to anticompetitive effects from group bidding by a small number of dominant players is mitigated by their ability to fully compete against each other for resources and capital.[1] I am more concerned about the potential abuses from a group bidding process in smaller markets such as the BTAs. This becomes especially problematic when spectrum is reserved for small business and rural telephone company participation. In this context, small individual companies may find themselves unable to obtain

[1] As I noted in my dissent to the PCS Second Report and Order, I would prefer three MTA licenses in this context, in order to ensure that more than the typical large telecommunications companies (i.e. interexchange carriers and the LECs) have an opportunity from the start to provide interoperable, viable competitive choices across the country. Under the current duopoly scheme for MTAs, I continue to be concerned that interexchange carriers and the LECs will be the dominant players in these licenses under a competitive bidding scenario. See *In Re:* Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, Gen. Dkt. No. 90-314 (September 23, 1993) (Barrett, A. dissenting) at 3.

a license through the competitive bidding process as long as there is a group bid that can always exceed the relative resources of individual small companies. While I understand that aggregation schemes are important, I am not sure that the playing field is necessarily equal where individual small businesses are forced in a "de facto" manner to join consortia in order to have any chance of obtaining a license through competitive bidding. It seems to me that public policy concerns for small business would provide a more equitable playing field in order to ensure a diverse source of participants who can win a competitive bid. By allowing group bids in the spectrum that might be reserved for small businesses, I am concerned that large interexchange carriers could stand behind the scenes, finance their selected small business throughout an area, and control a vast majority if not the entire number of spectrum bids for those licenses. If the intent of any reserved block for small businesses is to provide a variety of bidding opportunities on a relatively "equal playing field", I believe uncontrolled group bidding in these blocks may invite strategies that undermine this goal. Thus, I hope that various small business and rural telephone interests will address this issue thoroughly in the Notice. I do not want to see these groups effectively eliminated from the bidding process simply because they do not form large enough groups with deep pocket financiers. I look forward to reviewing comments on this issue.[2]

Second, I continue to be concerned about the additional complexity of aggregating several 10 MHz slivers of spectrum in order to get to a point where one can start a viable, economic PCS service. Given the lack of record on the economic viability of the 10 MHz PCS spectrum slivers above 2 GHz, I am concerned that bidders will be required to bid for at least two 10 MHz licenses before they can start any PCS service that will provide at least 70-80% coverage of BTAs in major markets. To the extent some of the individual 10 MHz allocations only provide coverage of 15-30% of an entire like Chicago, Los Angeles or Dallas, I am concerned that we have forced entities to bid for at least 2 licenses before they can start a viable PCS service.[3] Thus, while I am generally supportive of aggregation schemes across geographic areas (i.e. BTA's to MTA's or MTA's to nationwide), I continue to question the merit of requiring entities to aggregate across 10 Mhz spectrum licenses above 2 GHz in order to obtain a viable economic PCS license. This additional level of complexity, even in the auction context, appears to be an additional, unnecessary transaction cost, and creates the potential for uneconomic licenses from the start.[4] I continue to believe these licenses should be offered in 20 MHz increments in order to provide viable, economic PCS opportunities from the start. Thus, I hope commenters, including small business and rural telephone companies, will address the interrelationship of the PCS order with the spectrum aggregation schemes contemplated by this Notice.[5]

I look forward to comments in this docket. I am interested in reviewing comments on the various issues raised by the Notice. Commenters should address the manner in which the attribution limits adopted in the PCS order for cellular and PCS licenses, effects the ability to bid in group licenses or as individuals. I also am concerned that the Commission receives appropriate consultation and advice on how to correctly conduct competitive bidding for commercial mobile services. Thus, parties who have experience in valuation of spectrum and competitive bidding processes are encouraged to participate in this record.

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[2] I also encourage commenters to provide the Commission with various incentive proposals for including rural telephone companies and small businesses, including minority and women-owned businesses, in the ownership and operational structure of any consortia that bids for MTA licenses. Such incentives could include a percentage of deferred payment on a bid, tax certificates for the consortia investors, or enhanced credits on a bid. Given the likely strength of the broadband MTA licenses relative to the 5 other smaller BTA licenses, I wish to encourage inclusion of a diverse variety of parties in the ownership and operation of these MTA entities.

[3] See *In Re:* Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, Gen. Dkt. No. 90-314 (September 23, 1993) (Commissioner Barrett, Dissenting Statement) at pp. 8, 9, n 15, n 16.

[4] In addition, equipment availability and service interoperability standards will continue to be a significant dilemma under this scheme.

[5] In addition, those entities desiring to aggregate 40 MHz should note the equipment and technical interoperability problems of aggregating across bands above and below 2 GHz.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-269

In the Matter of

Amendment of Section 73.202(b),	RM-8318
Table of Allotments,	
FM Broadcast Stations.	
(Denison and	
Pilot Point, Texas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1993; Released: October 28, 1993

Comment Date: December 20, 1993
Reply Comment Date: January 4, 1994

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Davis Family Trust ("petitioner"), licensee of Station KTCY-FM, Channel 285C2, Denison, Texas, requesting the reallotment of Channel 285C2 from Denison to Pilot Point, Texas. In addition, petitioner requests the modification of its construction permit for Channel 285C2 at Denison to specify Pilot Point as the community of license. Petitioner states that it will apply for Channel 285C2, if reallotted.

2. Petitioner states that its proposal would provide Pilot Point with its first local aural transmission service. In support of its request, petitioner notes that Pilot Point is an incorporated community with a population of 2,588. Petitioner submits that Pilot Point has a mayor/city counsel form of government with a complement of civil, educational, and municipal facilities. To this end, petitioner states that the reallotment of Channel 285C2 to Pilot Point will leave the Denison-Sherman market with six local services[1] while providing Pilot Point with its "first local service".

3. We believe the proposal warrants further consideration since it could provide Pilot Point with its first local aural transmission service. Channel 285C2 can be allotted to Pilot Point in compliance with the Commission's minimum distance separation requirements with a site restriction of 16 kilometers (9.9 miles) north to accommodate petitioner's desired site.[2] As requested, we also propose to modify petitioner's authorization for Station KTCY-FM at Denison to specify Pilot Point as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 285C2 at Pilot Point or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Denison, Texas	285C2	–
Pilot Point, Texas	–	285C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 20, 1993** and reply comments on or before **January 4, 1994** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard M. Riehl, Esq.
Haley, Bader & Potts
4350 North Fairfax Drive, Suite 900
Arlington, Virginia 22203-1633
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presenta-

[1] Petitioner contends that Denison and Sherman are contiguous communities and are regarded locally and by Arbitron as a single market. Thereby petitioner states that Denison should be credited with having seven local transmission services which include KDSQ-FM, KDSX-AM Denison-Sherman; KIKM-FM, KWSM-FM, KXEB-AM and KJIM-AM Sherman, Texas; and KTCY-FM Denison, Texas. For purposes, of this proceeding we will credit Denison with having three local transmission services which include stations KIKM-FM, KTCY-FM and KDSX-AM. Petitioner's intent to credit Denison with stations that are licensed to Sherman, Texas, is misplaced, since those stations are only required to serve the community of Sherman.

[2] The coordinates for Channel 285C2 at Pilot Point are North Latitude 33-32-20 and West Longitude 96-57-15.

tion is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-271

In the Matter of

Amendment of Section 73.606(b) RM-8345
Table of Allotments,
TV Broadcast Stations.
(Walla Walla, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1993; Released: October 28, 1993

Comment Date: December 20, 1993
Reply Comment Date: January 4, 1994

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Broad Spectrum Communications, Inc. ("petitioner"), proposing the substitution of VHF Channel 9+ for vacant UHF Channel 14- at Walla Walla, Washington, as its first local television broadcast service. Petitioner states that it will apply for the channel, if allotted.

2. In support of the proposal, petitioner states that Walla Walla in the rural southest part of Washington and has a scattered population (26,478).[1] Petitioner alleges that it would be less expensive to operate a VHF television station than a UHF television station. Therefore, petitioner claims that it would be in the public interest to have a viable VHF television station in Walla Walla than have UHF Channel 14- remain fallow due to the anticipated costs of operation and reduced service area. Moreover, petitioner claims that Channel 14- is adjacent to land mobile communications and therefore would cause interference which would be costly to eliminate and would cause disruption to both services.

3. We believe the public interest would be served by proposing the substitute of Channel 9+ for vacant Channel 14- at Walla Walla, Washington, since it could provide the community with better service to a wider service area. An engineering analysis has determined that Channel 9+ can be substituted at Walla Walla in compliance with the Commission's mininum distance separation requirements without the imposition of a site restriction.[2] Since Walla Walla is located within 400 kilometers (250 miles) of the U.S-Canadian border, Canadian concurrence has been requested. Although the Commission has imposed a freeze on television allotments in certain areas, Walla Walla is not in one of the affected areas.[3]

4. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Walla Walla, Washington	14-	9+

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 20, 1993,** and reply comments on or before **January 4, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Margaret L. Tobey
Akin, Gump, Strauss, Hauer & Feld, LLP
1333 New Hampshire Ave., N.W., Suite 400
Washington, D.C. 20036
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

[1] Population figure taken from the 1990 U.S. Census.
[2] The coordinates for Channel 9+ at Walla Walla are North Latitude 46-04-12 and West Longitude 118-19-48.
[3] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service,* 52 Fed. Reg. 28346, July 29, 1987.

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-270

In the Matter of

Amendment of Section 73.202(b),	RM-8323
Table of Allotments,	RM-8339
FM Broadcast Stations.	
(Cordele, Dawson &	
Montezuma, Georgia)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: September 30, 1993; Released: October 28, 1993

Comment Date: December 20, 1993
Reply Comment Date: January 4, 1994

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration are two interrelated petitions for rule making. The first petition, filed by Radio Cordele, Inc. ("RCI"), licensee of Station WKKN(FM), Channel 252A, Cordele, Georgia, proposes to substitute Channel 236A for Channel 252A, and to modify its license to specify the new Class A channel. In order to accommodate the channel substitution at Cordele, RCI also proposes the substitution of Channel 290A for Channel 236A at Montezuma, Georgia, and the modification of the construction permit for Station WLML(FM) to specify Channel 290A. The second petition, filed by John F. Tuck and Phonson Donaldson, Bankruptcy Court Appointed Receivers for Dawson Broadcasting Company ("DBC"), licensee of Station WAZE(FM), Channel 251A,[1] Dawson, Georgia, seeks the substitution of Channel 251C3 for Channel 251A at Dawson, and modification of the license for Station WAZE(FM) to specify operation on Channel 251C3.[2] The upgrade at Dawson also requires the substitution of Channel 236A for Channel 252A at Cordele, Georgia, and the substitution of Channel 290A for Channel 236A at Montezuma, Georgia. RCI and DBC each states its willingness to apply for the requested channels, if allotted.

2. In support of its proposal RCI states that although the allotment of Channel 251A at Dawson meets the Commission's minimum distance separation requirements, it creates an interference problem and will greatly reduce Station WKKN's signal in the areas of Leesburg and Smithville, Georgia. RCI states that the interference problem can be eliminated by its proposal.

3. We believe the public interest would be served by proposing the substitution of Channel 251C3 for Channel 251A at Dawson, Georgia, since it could enable Station WAZE(FM) to expand its coverage area. Channel 251C3 can be allotted to Dawson, Georgia, in compliance with the minimum distance separation requirements of the Commission's Rules, with a site restriction of 19.7 kilometers (12.2 miles) southeast of the community.[3] Channel 236A can be allotted to Cordele, Georgia, in compliance with the minimum distance separation requirements of the Commission's Rules, with a site restriction 1.7 kilometers (1.1 miles) southeast at the authorized site of Station WKKN(FM).[4] Channel 290A can be allotted to Montezuma, Georgia, in compliance with the minimum distance separation requirements of the Commission's Rules, with a site restriction of 0.3 kilometers (0.2 miles) southwest at the construction permit site for Station WLML(FM).[5]

4. In accordance with Section 1.420(g) of the Commission's Rules, we shall propose to modify the license for Station WAZE(FM) without entertaining other expressions of interest in the use of Channel 251C3 at Dawson, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. In addition, we shall direct an *Order to Show Cause* to Macon County Broadcasting Company ("Macon County"), the permittee of Station WLML(FM) at Montezuma, Georgia, as to why its construction permit should not be modified to specify operation on Channel 290A in lieu of Channel 236A.

5. RCI and DBC argue that because Macon County holds a construction permit for an unbuilt station and is not yet a licensed facility no "costs" are required to be reimbursed. Whenever an existing licensee or permittee is ordered to change frequencies to accommodate a new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for costs incurred. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Therefore, if Macon County, the permittee for Montezuma can establish costs that directly concern the frequency change, then it could claim reimbursement. *See Burkesville and Russell Springs, KY, Cookeville and Spencer, TN*, 5 FCC Rcd 677 (1990). *See* also *Dyersburg, Tennessee, et al.*, 5 FCC Rcd 2579 (1990), and *Westover, West Virginia*, 48 RR 2d 168 (1980); *recon.* 48 RR 2d 1333 (1981) (addressing the failure of a licensee to state its willingness to reimburse a licensee or permittee). Therefore, RCI and DBC are requested to state their intentions to reimburse Macon County for reasonable costs incurred in changing frequencies.

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[1] The *Report and Order* in MM Docket No. 90-475, modified the license for Station WAZE(FM), Dawson to specify operation on Channel 251A. *See* 8 FCC Rcd 4366 (1993).

[2] On August 3, 1993, Day Communications, Inc., licensee of Station WQHL(FM) Live Oak, Florida, filed an application to downgrade its station to Channel 251C2 at its present site. *See* File No. BMLH-930803KB. The grant of this application would allow Station WAZE to upgrade on Channel 251C3. Final action on Station WAZE's upgrade may be withheld until Station WQHL's application is granted.

[3] The coordinates for Channel 251C3 at Dawson are North Latitude 31-40-03 and West Longitude 84-16-37.

[4] The coordinates for Cordele on Channel 236A at North Latitude 31-57-26 and West Longitude 83-46-08.

[5] The coordinates for Channel 290A at Montezuma are North Latitude 32-17-53 and West Longitude 84-02-02.

6. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Cordele, Georgia	252A	236A
Montezuma, Georgia	236A	290A
	OR	
Cordele, Georgia	252A	236A
Dawson, Georgia	251A	251C3
Montezuma, Georgia	236A	290A

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Macon County Broadcasting Company, permittee of Station WLML(FM), Channel 236A, Montezuma, Georgia, SHALL SHOW CAUSE why its construction permit should not be modified to specify operation on Channel 290A in lieu of Channel 236A.

8. Pursuant to Section 1.87 of the Commission's Rules, Macon County Broadcasting Company, may, not later than December 20, 1993, file a written statement showing with particularity why its construction permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Macon County Broadcasting Company, to furnish additional information. If Macon County Broadcasting Company, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Macon County Broadcasting Company, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: Macon County Broadcasting Company, P.O. Box 511, Montezuma, Georgia 31063.

10. The Commission's authority to institute rule making proceedings,showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **December 20, 1993,** and reply comments on or before **January 4, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James W. Jennings
Vice President
Radio Cordele, Inc.
910 20th Avenue East
P.O. Box 460
Cordele, GA 31015

John F. Tuck &
Phonso Donaldson
Receivers of Dawson
Broadcasting Company
c/o Truitt Martin, Jr., Esq.
P.O. Box 683
Dawson, GA 31742

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or

incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-180

In the Matter of

Amendment of Section 73.202(b), RM-8237
Table of Allotments,
FM Broadcast Stations.
(Bowie, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 8, 1993; Released: October 28, 1993

By the Assistant Chief, Allocations Branch:

1. At the request of Central Oklahoma Radio Corporation ("petitioner"), licensee of Station KFXT-FM, Sulphur, Oklahoma,[1] the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 4423 (1993), proposing the substitution of Channel 264A for Channel 264C3 for Station KRJT-FM at Bowie, Texas, and modification of KRJT-FM's license to specify the Class A channel. Petitioner filed comments. Bowie-Nocona Broadcasting Company, Inc. ("Bowie-Nocona"), licensee of Station KRJT-FM, Bowie, Texas, filed comments opposing the channel substitution, as well as initial comments, reply comments and a supplemental filing.[2] No other comments were received.

2. Our *Notice* proposing the substitution of Channel 264A for Channel 264C3 at Bowie was premised on the Commission's belief that Bowie-Nocona had abandoned its interest in upgrading its facilities at Bowie, Texas. However, in response to our *Notice*, Bowie-Nocona advised the Commission that it had tendered an application on May 27, 1993, thereby establishing its expression of interest to upgrade its facilities at Bowie. Therefore, since an expression of interest has been filed, the basis for the substitution at Bowie, Texas, is no longer valid.

3. IT IS ORDERED, That the petition for rule making filed by Central Oklahoma Radio Corporation (RM-8237), IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] We note that the *Notice* erroneously identified Sulphur, Louisiana, as Station KFXT-FM's community of license rather than Sulphur, Oklahoma.

[2] Bowie-Nocona also filed a petition for reconsideration of the *Notice* in this proceeding. Since a *Notice* is not a final action, pursuant to Section 1.429 of the Rules, the petition for reconsideration was not properly filed, and therefore this pleading and those filed in response were not considered. As stated *supra*, Bowie-Nocona's timely filed comments to the *Notice* were considered herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-272

In the Matter of

Amendment of Section 73.202(b), RM-8361
Table of Allotments,
FM Broadcast Stations.
(Madrid, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 12, 1993; Released: October 28, 1993

Comment Date: December 20, 1993
Reply Comment Date: January 4, 1994

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Madrid Broadcasting Company ("petitioner") requesting the allotment of Channel 241A to Madrid, Iowa, as the community's first local aural transmission service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 241A to Madrid, Iowa, as it could provide the community with its first local aural transmission service. Petitioner states that Madrid is listed in the 1990 U.S. Census and attributed with a population of 2,395 persons.

Technical Summary

3. Channel 241A can be allotted to Madrid in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.5 kilometers (8.4 miles) north to avoid short-spacings to Station KCOB-FM, Channel 240A, Newton, Iowa, and Station KEFM, Channel 241C, Omaha, Nebraska.[1] We note that the reference coordinates proposed herein reflect a short-spacing to the present operation of Station KQWC-FM, Channel 240A, Webster City, Iowa, and to the allotment coordinates for unoccupied but applied for Channel 241A at Hudson, Iowa. However, we believe that neither of these short-spacings should be a bar to the issuance of a *Notice of Proposed Rule Making* seeking comments on the allotment of Channel 241A to Madrid even though we were unable to identify a theoretical transmitter site which obviated these short-spacings. Station KQWC-FM's license was modified to specify Channel 239C3 pursuant to the *Report and Order* in MM Docket 88-369, and a construction permit (BPH-901210MG) for the higher class channel is outstanding. Further, a construction permit (BPH-920430MC) has been granted for Channel 241A at Hudson. Each of these permit sites allows compliance with the Commission's minimum distance separation requirements. Final action on the proposal herein, however, may be delayed pending the issuance of a license to either the Webster City or the Hudson permittee.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Madrid, Iowa	--	241A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 20, 1993,** and reply comments on or before **January 4, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue, Suite 500
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro or Stanley Schmulewitz (engineering issues), Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written

[1] The coordinates for Channel 241A at Madrid are North Latitude 41-59-47 and West Longitude 93-48-52.

information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-182

In the Matter of

Amendment of Section 73.202(b), RM-8269
Table of Allotments,
FM Broadcast Stations.
(Columbiana, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 12, 1993; Released: October 28, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 4494 (1993), issued in response to a petition filed on behalf of Columbiana Broadcasting Company ("petitioner") proposing the allotment of Channel 268A to Columbiana, Alabama, as that community's first local aural transmission service. Petitioner filed comments in support of the proposal. No other comments were received.

2. We believe the public interest would be served by allotting Channel 268A to Columbiana since it could provide a first local aural transmission service to the community.

Engineering Analysis

3. As indicated in the *Notice*, Channel 268A can be allotted to Columbiana consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 3.8 kilometers (2.4 miles) west of the community[1] to avoid a short-spacing to the licensed site of Station WKHX-FM, Channel 268C, Marietta, Georgia, at coordinates 33-48-27 and 84-20-26, as well as to the licensed site of Station WHHY-FM, Channel 270C, Montgomery, Alabama, at coordinates 32-24-11 and 86-11-48.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Columbiana, Alabama, as follows:

City	Channel No.
Columbiana, Alabama	268A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications for Channel 268A at Columbiana, Alabama, will open on **December 14, 1993,** and close on **January 13, 1994**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 268A at Columbiana should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 268A at Columbiana are 33-10-04 and 86-38-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-113

In the Matter of

Amendment of Section 73.202(b), RM-8212
Table of Allotments,
FM Broadcast Stations.
(Newport, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 7, 1993; Released: October 28, 1993

By the Assistant Chief, Allocations Branch:

1. At the request of Charlotte McNaughton ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 2882 (1993), proposing the substitution of Channel 224C2 for Channel 224C3 at Newport, Oregon, and the modification of Station KCLM's construction permit to specify operation on the higher class channel. Petitioner filed comments reiterating her intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 224C2 for Channel 224C3 at Newport since it could enable Station KCLM to expand its coverage area. As proposed, we will also modify Station KCLM's construction permit to specify operation on Channel 224C2.

Technical Summary

3. Channel 224C2 can be allotted to Newport in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.7 kilometers (7.9 miles) north to accommodate petitioner's desired transmitter site.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Newport, Oregon,	224C2, 247C1

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Charlotte McNaughton for Station KCLM, IS MODIFIED to specify operation on Channel 224C2, in lieu of Channel 224C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Charlotte McNaughton, permittee of Station KCLM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 224C2 at Newport are North Latitude 44-45-22 and West Longitude 124-02-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SHARECOM, INC.,
Complainant,

v.

U S WEST COMMUNICATIONS, INC.,
Defendant.

File No. E-93-150

ORDER

Adopted: October 22, 1993; Released: October 29, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1993, American Sharecom, Inc. (Sharecom), filed the above - captioned complaint against U S WEST Communications, Inc. (U S WEST), seeking damages resulting from U S WEST's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On October 19, 1993, however, Sharecom and U S WEST filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

KIRBY COMMUNICATIONS, INC. File No. I-T-C-93-280

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 20, 1993; Released: October 29, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public on a resale basis by Kirby Communications, Inc. (Kirby).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-280 IS GRANTED and Kirby is authorized to provide international switched voice service by the resale of the international switched voice services set forth in Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicant shall file a copy of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

4. IT IS FURTHER ORDERED that the applicant shall file tariffs pursuant to §203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-93-310

Application for authority to acquire and operate facilities for service between the U.S. and Angola, Mauritius, Mozambique and Rwanda.

ORDER AND AUTHORIZATION

Adopted: October 20, 1993; Released: October 29, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Angola, Mauritius, Mozambique and Rowanda by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-310 IS GRANTED and MCI is authorized to:

a. lease from Comsat and operate eight voice-grade satellite circuits between the Mt. Jackson, Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Angola furnished by MCI's correspondent in Angola;

b. own and operate eight voice-grade circuits in the Mt. Jackson earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate eight voice-grade connecting circuits between the Mt. Jackson earth station and MCI's West Orange, New Jersey operating center; and

d. use facilities in a. b and c above to provide MCI's regularly authorized services between the U.S. and Angola;

e. lease from Comsat and operate eight voice-grade satellite circuits between the Andover, Maine earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Mauritius, furnished by MCI's correspondent in Mauritius;

f. own and operate eight voice-grade circuits in the Andover earth station, to be used in conjuction with the satellite space segment capacity;

g. own and operate eight voice-grade circuits between the Andover earth station and MCI's West Orange, New Jersey office;

h. use the facilities in e. f and g above to provide MCI's regularly authorized services between the U.S. and Mauritius;

i. lease from Comsat and operate ten voice-grade satellite circuits between the Mt. Jackson earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Mozambique, furnished by MCI's correspondent in Mozambique;

j. own and operate 10 voice-grade circuits in the Mt. Jackson earth station, to be used in conjunction with the satellite space segment capacity;

k. own and operate 10 voice-grade circuits between the Mt. Jackson earth station and MCI's West Orange, New Jersey office;

l. use the facilities in i, j and k above to provide MCI's regularly authorized services between the U.S. and Mozambique;

m. lease from Comsat and operate eight satellite voice-grade circuits between the Mt. Jackson earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Rwanda, furnished by MCI's correspondent in Rwanda;

n. own and operate eight voice-grade circuits in the Mt. Jackson earth station, to be used in conjunction with the satellite space segment capacity;

o. own and operate eight voice-grade circuits between the Mt. Jackson earth station and MCI's West Orange, Jew Jersey office; and

p. use the facilities in m, n and o above to provide MCI's regularly authorized services between the U.S. and Rwanda.

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Angola, Mauritius, Mozambique and Rwanda -- that is, private lines which originate in the United States and terminate in Angola, Mauritius, Mozambique and Rwanda or which originate in Angola, Mauritius, Mozambique and Rwanda and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Angola, Mauritius, Mozambique and Rwanda end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Angola, Mauritius, Mozambique and Rwanda afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the

purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to §203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies
Tariff F.C.C. No. 1

Transmittal No. 127

Applications for Review

MEMORANDUM OPINION AND ORDER

Adopted: October 13, 1993; Released: October 29, 1993

By the Commission:

I. INTRODUCTION

1. On February 11, 1993, the Common Carrier Bureau (Bureau) released an order[1] denying a petition to reject NYNEX Transmittal No. 127 which established NYNEX's Enterprise service (Enterprise). The Bureau's order also granted a limited waiver of Section 64.702(e) of the Commission's Rules, 47 C.F.R. § 64.702(e),[2] to enable NYNEX Telephone Companies (NYNEX) to offer Enterprise. The order limited the waiver to situations where a customer subscribed to 22 or fewer Enterprise DS0[3] channels at one location.[4]

2. Independent Data Communications Manufacturers Association (IDCMA), which had filed the petition against Enterprise, has filed an application for review of the Bureau's *Waiver Order*, arguing that a waiver was not justified, and that the decision granting the waiver should be overturned.[5] Five parties filed comments in support of IDCMA's application, including three user groups and two equipment manufacturing groups.[6]

3. NYNEX also filed an application for review of the *Waiver Order*, arguing that (1) no waiver was necessary because the multiplexer used to provide Enterprise service falls within the so-called "multiplexer exception" to the Commission's anti-bundling rule, and (2) the waiver's limitation to customers subscribing to 22 or fewer DS0 channels at one location is arbitrary, discriminatory and anticompetitive.[7] Four parties filed comments or reply comments in support of NYNEX, including three Bell Operating Companies and the Securities Industry Association, a customer of Enterprise service.[8]

4. In this Order we deny NYNEX's application, and grant IDCMA's application, to the extent discussed below. Specifically, we overturn the Bureau's waiver order, and order NYNEX either to withdraw Enterprise service, or to revise its offering to provide service on an unbundled basis and comply with the network disclosure requirements of Sections 68.110 and 64.702(d)(2) of the Commission's rules, 47 C.F.R. §§ 68.110, 64.702(d)(2), by publishing interface standards for multiplexer interconnection and interoperation with Enterprise service, so that customers may provide their own multiplexers as CPE. In either case, we will allow the waiver to remain in effect for the bundled arrangements of existing interstate customers[9] of Enterprise service for a twelve-month transition period, beginning on the day following the release of this order.

II. BACKGROUND

5. NYNEX filed Transmittal 127 on October 22, 1992, to introduce Enterprise DS0 service. Enterprise provides DS0-level transmission service, provided largely over fiber-optic facilities, and certain automated network management features, such as remote monitoring and

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[1] NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 127, Order, 8 FCC Rcd 693 (Com. Car. Bur. 1993)(*Waiver Order*).

[2] Section 64.702(e), known as the "bundling" or "anti-bundling" rule, prohibits bundling of customer premises equipment (CPE) with regulated (tariffed) transmission service. CPE is equipment located at a subscriber's premises which is connected to a carrier's communication channel(s) at the network interface at that subscriber's premises. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C. 2d 384, 398 n.10 (1980).

[3] DS0 service is a communications channel with a data stream transmission capacity of 64 Kbps, commonly used as an individual circuit for either voice grade analog or digital data transmission. DS1 service is equivalent to 24 DS0 circuits, or 1.544 Mbps. DS3 service is equivalent to 28 DS1 circuits, or 44.736 Mbps.

[4] *Waiver Order*, 8 FCC Rcd at 695.

[5] *See* Application for Review of Action Taken Pursuant to Delegated Authority, filed by IDCMA on February 12, 1993. On April 6, 1993, IDCMA filed a Reply, along with an Emergency Motion to Exceed Page Limitations and a Motion for Leave to File, Out of Time, Emergency Motion to Exceed Page Limitations. IDCMA also filed, on March 22, 1993, an Opposition to an application for review of the *Waiver Order* filed by NYNEX. We grant both motions, and accept IDCMA's Reply.

[6] *See* Comments of Tandy Corporation (Tandy), filed March 22, 1993; Comments of Control Resources Corporation (CRC), filed March 22, 1993; Comments of the Information Technology Association of America (ITAA), filed March 22, 1993; Comments of the International Communications Association (ICA), filed March 22, 1993; Comments of the North American Telecommunications Association (NATA), filed March 22, 1993; Reply Comments of NATA, filed April 6, 1993. *See also* Reply Comments of ICA, filed April 6, 1993, in which ICA argues that neither application should be granted, but the Commission should instead begin a rulemaking to investigate the issues raised by the applications.

[7] *See* NYNEX Application for Review, filed February 19, 1993. NYNEX also filed an Opposition to IDCMA's application for review on March 22, 1993, and a Reply to Oppositions on April 6, 1993.

[8] *See* Comments of the Securities Industry Association (SIA), filed March 22, 1993; BellSouth Telecommunications, Inc. (BellSouth) Comments in Support of NYNEX Application for Review, filed March 22, 1993; Comments of Ameritech on Applications for Review (Ameritech), filed March 22, 1993; and Reply Comments of Southwestern Bell Telephone Company (Southwestern Bell), filed on April 6, 1993.

[9] *See* note 77 , *infra*.

provisioning.[10] The service is delivered by placing on customer premises "intelligent" multiplexing equipment (Newbridge Mainstreet 3600 or 3624), which communicates with Newbridge multiplexers at NYNEX's central office. The 24th DS0 channel on the customer premises multiplexer is used to communicate with the central office multiplexer and thereby provide the network management features available under Enterprise. At the customer's end of an Enterprise circuit, Enterprise uses an optical line terminating multiplexer (OLTM) which converts an optical signal (carried on a fiber optic facility) to an electrical signal, then multiplexes the signal from DS3 to multiple DS1 channels. A Newbridge multiplexer is then used to convert DS1 channels coming out of the OLTM on copper 4-wire cable into multiple DS0 channels. NYNEX argued that the service could be provided only if NYNEX deployed multiplexers on customers' premises and contended that such equipment fell within the "multiplexer exception" to the Commission's prohibition against the bundling of CPE with tariffed offerings.[11]

6. In the *Waiver Order*, the Bureau held that NYNEX failed to demonstrate that the Newbridge multiplexers used to deliver Enterprise fell within the multiplexer exception to the Commission's rule against bundling CPE, and therefore concluded that Transmittal 127 violated Section 64.702(e).[12] The Bureau concluded that NYNEX was using the bundled Newbridge multiplexer for the purpose of providing additional functionalities which NYNEX had not demonstrated were provided by multiplexers on customer premises at the time of the *Computer III, Phase II Reconsideration Order*.[13] For other reasons however, the Bureau also found that the record before it warranted granting NYNEX a limited waiver of Section 64.702(e).[14]

7. Specifically, the Bureau determined that remote provisioning of digital interface cards located in the customer-premises multiplexer allowed NYNEX to alter Enterprise DS0 service specifications without dispatching a technician, creating significant network efficiencies that could not be accomplished if multiplexers were not on customer premises. The Bureau also found that NYNEX could deliver DS0 fiber service to customers more efficiently with the Enterprise customer premises multiplexer because it enabled multiple smaller users to share the capacity of a DS1.[15]

8. The Bureau determined that comparable efficiencies or service offerings could not be obtained with unbundled multiplexers in situations involving small customers, subscribing to 22 or fewer Enterprise DS0 channels, who could share an Enterprise customer-premises multiplexer. The Bureau reasoned that for these customers, shared use of unbundled CPE would require complex cost-sharing, access and maintenance agreements. The Bureau concluded that customers who could use all 23 channels available on an Enterprise multiplexer would not introduce sharing efficiencies and thus would not warrant a bundled multiplexer.[16]

9. As discussed below, we find that the record, developed more fully on review, does not support the Bureau's waiver. In particular, NYNEX has failed to demonstrate that multiplexers on a customer's premises are required to make Enterprise service technically possible, and that comparable efficiencies or services could not be attained through the use of unregulated CPE. We agree with the Bureau's conclusion that NYNEX's use of bundled multiplexers for Enterprise service does not fall within the multiplexer exception.

III. DISCUSSION

A. Multiplexer Exception

1. NYNEX Application

10. NYNEX argues that the Bureau has misconstrued the scope of the multiplexer exception. According to NYNEX, so long as a multiplexer is deployed on a customer's premises to provision a tariffed basic service offering of two or more channels to a single customer, or single channels to two or more customers, it falls within the exception.[17] NYNEX contends that the Enterprise customer-premises multiplexer meets this criterion.[18]

11. NYNEX argues that the Bureau misconstrued the Commission's multiplexer exception and limited the exception to D-4 channel banks and subscriber line carriers and updated versions thereof. According to NYNEX, the Commission's order establishing the exception[19] listed such equipment only as examples. NYNEX contends that the key to applying the multiplexer exception is the "manner and purpose" for which the multiplexer is deployed.[20] NYNEX argues that Enterprise service customer premises multiplexers are deployed to perform the same functionalities at the customer's premises as those provided by D-4 channel banks and subscriber line carriers.[21] NYNEX asserts that the Newbridge multiplexers on customers' premises are used in the same manner and for the same purpose as updated and improved versions of D-4 channel banks and subscriber line carriers.[22] NYNEX contends that remote provisioning and monitoring are network, not CPE, functionalities, and that performance of network functionalities by regulated multiplexers on customer premises has never been questioned by the Commission.[23] NYNEX also argues that multiplexers designed to be used with fiber optic loop plant were expressly permitted in the *Computer III, Phase II Reconsideration Order*.[24]

2. IDCMA Opposition

12. IDCMA contends that NYNEX has misinterpreted the multiplexer exception, and if that interpretation were accepted, the exception would swallow the rule because the regulatory status of customer-premises multiplexers could be determined by carriers without regard to the location

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[10] Transmittal 127 Description and Justification.
[11] *Id.* at 21-27.
[12] *Waiver Order*, 8 FCC Rcd at 695.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] NYNEX Application at 12.
[18] *Id.* at 16.
[19] Amendment to Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase II, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd 1150 (1988)(*Computer III, Phase II Reconsideration Order*).
[20] NYNEX Application at 12-13.
[21] *Id.* at 14 n.26.
[22] *Id.* at 16.
[23] *Id.* at 17, NYNEX Opposition at 11.
[24] NYNEX Application at 13, 15.

and functionality of the equipment at issue.[25] IDCMA argues that NYNEX's interpretation is based on an early, ambiguous enunciation of the multiplexer exception in *Computer II*,[26] while later Commission decisions, such as the *LADT Order* and *Computer III, Phase II Reconsideration Order*, clarified that the exception was narrow in scope.[27] IDCMA points out that under the *LADT Order*, the exception may be invoked only where use of the multiplexer is transparent to the subscriber, who "neither necessarily knows nor cares" whether a multiplexer is used.[28] IDCMA argues that Enterprise is not transparent because customers both know and care that (1) Enterprise is inherently a derived channel service -- the customer is guaranteed that individual circuits will be derived from a high capacity fiber-optic transmission facility; and (2) one channel of the customer-premises Newbridge multiplexer is used to perform the network monitoring, reconfiguration and remote provisioning functions.[29]

13. IDCMA contends the *Computer III, Phase II Reconsideration Order* "grandfathered" specific types of already-deployed multiplexers in order to recognize the needs of carriers to avoid the expense of additional loop plant.[30] IDCMA contends further that the "manner and purpose" test enunciated in that order was designed to keep grandfathered equipment distinct from equipment outside the exception, and that Enterprise service does not pass the "manner and purpose" test. According to IDCMA, the "purpose" for which multiplexing equipment could lawfully be used on a customer's premises was to avoid the cost of constructing multiple loops. According to IDCMA, this purpose is not served by the on-premises multiplexers in Enterprise because unbundling those multiplexers would not require NYNEX to use multiple loops instead of high capacity fiber facilities. IDCMA argues that Enterprise customer premises multiplexers are used in a different "manner" than those referenced in the *Computer III, Phase II Reconsideration Order* because the use of multiplexers is not transparent with Enterprise.[31]

3. Commenters

14. SIA, which filed comments in support of NYNEX, argues that, from a customer's perspective, service quality and value are compromised if the multiplexer is not located inside a customer's data center.[32] SIA contends that, although it supports the Commission's unbundling policies, it believes Enterprise cannot be provided efficiently on an unbundled basis at this time, and urges the Commission not to prohibit bundling under Enterprise merely to maintain the integrity of the anti-bundling rule.[33] SIA contends that unbundling Enterprise service where users now share multiplexers would be commercially and administratively impractical.[34] Other commenters, namely BellSouth, Ameritech and Southwestern Bell, support NYNEX's application for review.

4. Discussion

15. We affirm the Bureau's holding that the multiplexer exception does not apply to the Newbridge multiplexer used to deliver DS0 channels in Enterprise service. Although NYNEX correctly cited the multiplexer standard in its application for review, NYNEX mischaracterized the Bureau's interpretation.[35] Contrary to NYNEX's contention, the Bureau did not state that the exception applies only to D-4 channel banks and subscriber line carriers. The Bureau properly stated that a carrier has the burden of demonstrating either that: (1) the equipment, such as D-4 channel banks or subscriber loop carriers, was provided under the multiplexer exception at the time of the *Computer III, Phase II Reconsideration Order;* or (2) equipment in the instant case is an updated or improved version of such grandfathered equipment, and will be provided "in the same manner, and for the same purpose" as the grandfathered equipment, in order for the exception to apply.[36] The Bureau stated that such a showing could be made by comparing the functionalities of the equipment identified in that order with those provided by the equipment for which the carrier claims the exception.[37] The Bureau concluded that NYNEX had failed to make such a showing.[38]

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[25] IDCMA Opposition at 13.

[26] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 447 n.57 (1980)(*Computer II*); (subsequent history omitted).

[27] IDCMA Opposition at 14, *citing* International Business Machines Corp., 58 R.R.2d 374 (1985)(*LADT Order*), and *Computer III, Phase II Reconsideration Order*, 3 FCC Rcd at 1167-68.

[28] *LADT Order*, 58 R.R.2d at ¶ 12.

[29] IDCMA Opposition at 15-16. In its Reply to IDCMA's Opposition, NYNEX argued that the customer-premises multiplexer is transparent to the customer, because the customer "sees" a standard DS0 interface, *see* NYNEX Reply at 4, although in its Reply to IDCMA's Petition to Reject Transmittal No. 127, NYNEX had conceded that Enterprise is not perfectly transparent to the customer. NYNEX argued there that transparency is merely a guideline and not a requirement for invoking the multiplexer exception. *See* Reply of the NYNEX Telephone Companies at 18, filed November 16, 1992.

[30] *Id.* at 21-22. IDCMA argues that such "grandfathering" was done in response to carriers urging expansion of the exception, and notes that the position taken by Pacific Telesis in favor of expanding the multiplexer exception, which the Commission rejected in the *Computer III, Phase II Reconsideration Order* proceeding, was almost identical with the position taken by NYNEX in its instant application for review. *Id.* at 22 and n.48.

[31] *Id.* at 23.

[32] Comments of SIA at 5.

[33] *Id.* at 6. SIA also argues that although it has requested that Newbridge publish and license its protocol for the multiplexers used in Enterprise service so that SIA members can interconnect their own multiplexers, Newbridge has refused to do so. *Id.*

[34] *Id.* at 7-8.

[35] *See* NYNEX Application at 12-13.

[36] *See Waiver Order*, 8 FCC Rcd at 695, *citing Computer III, Phase II Reconsideration Order*, 3 FCC Rcd at 1167-68.

[37] *See Waiver Order*, 8 FCC Rcd at 695, *citing* BellSouth Telecommunications Digital Transmission Service, Order, 7 FCC Rcd 5504 (Com. Car. Bur. 1992).

[38] IDCMA argues that transparency is a key criterion for determining whether the multiplexer exception applies. IDCMA Opposition at 15. NYNEX argues that the manner and purpose test is the applicable standard. NYNEX Application at 15. Transparency to the customer is one indication that equipment is being used for the same manner and purpose as the transparent concentration function of multiplexers in use at the time of the *Computer III, Phase II Reconsideration Order*.

16. The network management and remote provisioning functions provided by Enterprise multiplexers were not provided by equipment grandfathered in 1988. Therefore, we conclude, as did the Bureau, that NYNEX failed to demonstrate that Newbridge multiplexers are used in the same manner and for the same purpose as equipment which falls within the exception.[39] NYNEX has presented no new facts on review to show that Enterprise meets the "manner and purpose" standard.

17. NYNEX asserts in its application for review that D-4 channel banks and subscriber loop carriers "perform the same functionalities that are provided by NYNEX Enterprise Service multiplexers to enable the provision of individual DS0 channels for NYNEX Enterprise Service."[40] This reference to the common ground between Enterprise multiplexers and excepted equipment does not satisfy the crucial issue. Enterprise multiplexers are used to perform additional network management functions, such as remote monitoring and provisioning, which were not provided by the excepted equipment. Therefore, they are not used in the same manner as excepted equipment.

18. NYNEX's only argument regarding these functionalities is to state that they are "network" functionalities rather than "CPE" functionalities.[41] This argument does not help NYNEX's case. The fact that the additional functionalities provided by the on-premises multiplexers were historically provided elsewhere in the network is irrelevant. To conclude that an expansion in the functionalities performed by a multiplexer on customer premises is simply a permitted update or improvement, because the functions are "network" functions, is to negate the requirement that the multiplexer be provided in the same manner and for the same purpose as excepted equipment. The Commission's limited exception in *Computer III, Phase II Reconsideration Order* does not authorize an unlimited expansion in the functionalities provided by an on-premises multiplexer simply because those additional functionalities were previously "network" functionalities.

19. NYNEX also argues that the Commission did not intend to "freeze" the level of functionalities that a network multiplexer could provide, and that the Commission, in the *Computer III, Phase II Reconsideration Order*, approved the use of network multiplexing with developing technology, citing as an example the use of subscriber loop carriers with fiber.[42] NYNEX is incorrect. The Commission did intend to limit the deployment of network multiplexers containing additional functionalities not performed by multiplexers deployed in 1988. The only exception is updated or improved versions of then existing types of multiplexers which were used in the same manner and for the same purpose.

20. With respect to NYNEX's admonition that deployment of fiber-based technology will be delayed if we do not rule that the exception applies, we are unpersuaded. Enterprise offers fiber-based transmission capability to the DS1 level, terminated with an OLTM. The record shows that, once Enterprise reaches the OLTM, the signals are converted from optical to electrical signals and delivered to the Newbridge (and beyond) over copper cable, not fiber. Newbridge customer-premises multiplexers are not connected directly to fiber, whether they are installed in common space or on a customer's premises. Thus, fiber deployment is not compromised if NYNEX cannot offer the Newbridge multiplexer as part of its regulated network.

B. Waiver

21. Given that NYNEX has failed to demonstrate that its deployment of the Newbridge multiplexer falls within the multiplexer exception to the CPE unbundling rule, NYNEX's only other recourse is to obtain a waiver of the unbundling rule. Under the waiver standard, a carrier must demonstrate both that: (1) the offering of particular functions as part of the network service will serve the public interest by increasing the efficiency, or making technically possible the delivery of a particular service; and (2) provision of those functions through unregulated CPE will not permit attainment of comparable efficiencies or service offerings.[43]

1. IDCMA Application

22. IDCMA challenges the Bureau's decision to grant a limited waiver to permit NYNEX to provide Enterprise through customer-premises multiplexers so long as no customer uses more than 22 of the 23 DS0 channels available from the Newbridge multiplexer. IDCMA argues that NYNEX never met the two-pronged standard required for waiver of Section 64.702(e) enunciated above.[44] IDCMA further contends that the Bureau's order rests on erroneous findings of fact, and on a flawed legal analysis, and must be overturned.[45]

23. With respect to the first prong of the waiver standard, that bundling must be shown to increase efficiency or make the service technically possible, IDCMA contends that there is no technical reason why the network monitoring functionalities offered remotely with Enterprise cannot be performed by NYNEX using unbundled CPE,[46] provided NYNEX complies with the Commission's network information disclosure rules so that CPE manufacturers have the opportunity to design compatible equipment and systems.[47] IDCMA notes that with disclosure of interconnection and interoperation specifications, customers would have a choice of CPE and CPE manufacturers.[48] IDCMA also disagrees with NYNEX's assertion that DS0-level service technically cannot be provided unless the customer-premises multiplexer is network equipment. IDCMA argues that any number of DS0 circuits, up to 24, can be provided across a DS1 interface to an unbundled

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[39] *See Waiver Order*, 8 FCC Rcd at 695.
[40] NYNEX Application at 14 n.26.
[41] *Id.* at 13, 17; NYNEX Opposition at 11.
[42] NYNEX asserts that optical line terminating multiplexers (OLTMs), which are used to multiplex fiber, are therefore within the exception. *See* NYNEX Application at 15. Of course, the Bureau decision did not address the bundling of customer-premises OLTMs.
[43] *Computer III, Phase II Reconsideration Order*, 3 FCC Rcd at 1167-68.
[44] IDCMA Application at 4.
[45] *Id.* at 5.
[46] *Id.* at 13-14.
[47] *Id.* at 24 n.60, *citing* 47 C.F.R. §68.110(b).
[48] *Id.* at 13.

multiplexer,[49] and that NYNEX is currently providing such a service, called fractional T-1 digital service, in Massachusetts.[50]

24. IDCMA disputes the efficiency rationale as well, characterizing as frivolous the conclusion that the simplicity of monopoly, sole-source provisioning is a valid justification for a waiver.[51] IDCMA argues that carriers can always show this kind of efficiency by simplifying customers' transactions regarding CPE through bundling, and contends that complexity is inherent in competitive marketplace situations.[52] IDCMA challenges the Bureau's conclusion that sharing of bundled multiplexers is more efficient because it is less burdensome for customers.[53] IDCMA contends that unrelated Enterprise customers in multi-tenant buildings do not share bundled customer-premises multiplexers.[54] IDCMA points out that customers who have no business associations would not desire sharing of customer-premises equipment through which their business-sensitive communications are transmitted, regardless of whether or not such equipment is bundled with their transmission service.[55]

25. With respect to customers in different locations who terminate lines on each other's premises in order to establish private line communications links, IDCMA disputes the Bureau's conclusions regarding any efficiencies created through bundling.[56] IDCMA argues that because such customers have existing business relationships, it would not be unnecessarily complicated for them to share the costs of unbundled multiplexers, in the event they wish to do so. In addition, IDCMA asserts that privacy or security considerations which might support the need for carrier control over the equipment where customers have no relationship are not present when customers seek private lines to each others' premises, since these customers share access to the traffic over the circuit.[57] IDCMA argues that even if such customers choose to lease an unbundled multiplexer from NYNEX, the carrier can, for example, bill separately for channel charges and CPE charges based on usage.[58]

26. IDCMA also argues that remote provisioning creates no new efficiencies, and can actually be done more efficiently using unbundled customer-premises multiplexers, provided NYNEX discloses the requisite network interconnection information.[59] IDCMA questions whether any network efficiencies are actually created by remote provisioning, since technicians must still install line cards and occasionally replace digital with analog cards, and vice versa. In addition, NYNEX must bear the cost of non-revenue-producing "spare" cards for unused capacity in the multiplexer.[60] IDCMA contends that, because NYNEX has failed to demonstrate increased efficiencies from bundled CPE, NYNEX has failed to satisfy the second prong of the waiver standard, *i.e.*, that Enterprise service cannot be provided on a comparably efficient basis using unbundled CPE.

27. Finally, IDCMA disputes NYNEX's argument that Commission rules prevent NYNEX from using CPE to provide Enterprise's service features. IDCMA contends that regulated services are always provided through interconnected CPE, and frequently control and activate CPE, *e.g.*, the "tip and ring" control the network uses to effectuate the ringing of a telephone.[61]

2. NYNEX Opposition

28. NYNEX argues that if the customer-premises multiplexer is unbundled, only DS1-level service can be delivered to the customer because the multiplexer would be located on the customer's side of the network interface.[62] NYNEX also contends that fractional T-1 service, which offers blocks of multiple 64 Kbps channels (equivalent to multiple DS0 circuits) while stripping out unused bandwidth at the central office, cannot be used to provide Enterprise because it wastes bandwidth.[63]

29. NYNEX contends that Enterprise meets the criteria of the two-part waiver standard, but requests that the waiver be upheld only if the Commission concludes that the multiplexer exception does not apply.[64] In support of the waiver, NYNEX asserts that the bundled multiplexer increases efficiency and makes technically possible the delivery of Enterprise service over fiber together with remote provisioning and monitoring services.[65] In addition, NYNEX argues that because Enterprise cannot be offered, provisioned or monitored using CPE, the unregulated multiplexer would not permit attainment of comparable efficiencies or service offerings.[66]

30. NYNEX also argues that if multiplexers were unbundled, customers sharing a multiplexer would have to purchase DS1 service, arrange for sharing of the equipment, and take responsibility for quality, administration and provisioning of service at the DS0 level. NYNEX asserts that the critical efficiencies in Enterprise are due not to sharing, but rather to remote provisioning and monitoring services.[67]

3. Discussion

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[49] *Id.* at 20-22.
[50] IDCMA Reply at 14. IDCMA has attached the Massachusetts tariff as Appendix A to its Reply.
[51] IDCMA Application at 12.
[52] *Id.* at 13-14.
[53] IDCMA Application at 16-20.
[54] *Id.* at 16-17. IDCMA cites statements made by NYNEX representatives in meetings with Commission staff prior to the Bureau order. In the course of this review proceeding, NYNEX told Commission staff that when unrelated customers in the same building order Enterprise service, a multiplexer is located in the basement, rather than on customer premises.
[55] *Id.* at 17 and n.37.
[56] *Id.* at 17-20.
[57] *Id.* at 18 and n.38.
[58] *Id.* at 19-20.
[59] *Id.* at 11; *see also* IDCMA Reply at 15.
[60] IDCMA Opposition at 18-19.
[61] IDCMA Application at 22.
[62] NYNEX Opposition at 6. NYNEX contends that, technically, it cannot provide fiber-based DS0 service without deploying a multiplexer on the customer's premises. NYNEX Application at 19.
[63] NYNEX Opposition at 7-8.
[64] *Id.* at 15 and n.33.
[65] *Id.* at 15. In its Reply to IDCMA's application, NYNEX argued that the availability of spare cards in multiplexers reduces the need to dispatch technicians, thereby creating network efficiencies. NYNEX Reply at 2 n.4.
[66] NYNEX Opposition at 15-16.
[67] *Id.* at 15-17.

31. We agree with IDCMA that NYNEX has failed to meet the waiver standard and that the Bureau's waiver order should be overturned. The waiver standard requires a carrier to demonstrate both that (1) bundling will either increase the efficiency, or make technically possible the delivery, of a particular basic service, and (2) that comparable efficiencies or service offerings cannot be obtained using unregulated CPE.[68]

32. NYNEX argues that deployment of regulated multiplexers makes the service technically possible by enabling delivery over fiber.[69] As discussed above, however, the record shows that Enterprise channels are delivered to the Newbridge multiplexer, and beyond, over copper facilities, not fiber. Therefore, this rationale is not helpful in justifying a waiver.

33. NYNEX contends that if a customer supplies its own multiplexer, NYNEX can deliver only DS1 service, since the customer-provided multiplexer derives the DS0 channels, and cannot provide remote provisioning and monitoring of those DS0 channels.[70] IDCMA disputes NYNEX's contention, observing that the DS0 channels on the DS1 "pipe" are established by NYNEX's central office, not the multiplexer.[71] Thus, the service NYNEX provides to the customer under this scenario is still DS0 service, although a multiplexer is required to retrieve the DS0 channel. IDCMA asserts that NYNEX's provision of fractional DS1 service to unbundled multiplexers in Massachusetts disproves NYNEX's contention.[72] We agree with IDCMA's characterization of the role multiplexers play in deriving DS0 channels. The fact that NYNEX may choose to provision a customer's DS0 requirements through use of a DS3 or DS1 facility does not change the nature of the service the customer obtains and for which NYNEX may charge. Thus, we conclude that DS0 level service technically can be provided whether or not the multiplexer is bundled.

34. NYNEX argues that because IDCMA cannot deny the efficiencies inherent in remote provisioning and monitoring, IDCMA simply challenges whether the efficiencies of shared multiplexer use justify the Bureau's waiver grant. But the issue of whether sharing creates efficiencies is not the same as the issue of whether shared multiplexers can only be located on a customer premises. Our bundling prohibition is not violated when NYNEX installs Enterprise multiplexers on its side of the demarcation between NYNEX's network and the customer premises. Thus, NYNEX can offer Enterprise through a shared multiplexer and achieve the efficiencies of such sharing without a waiver of our bundling prohibition so long as it installs the Newbridge multiplexer in an area it controls, *e.g.*, the basement or electrical closet where local exchange companies typically install their network equipment in multitenant situations. Indeed, the record shows that NYNEX can, and does, deploy multiplexers in carrier-controlled common space such as basements and locked communications closets on a building floor, particularly when unrelated customers will be served by the same multiplexer.[73] Thus, even if we agreed that there are significant efficiencies to be gained from sharing multiplexers, this factor does not support the conclusion that multiplexers also must be placed on customer premises. NYNEX argues that remote provisioning and monitoring services create efficiencies by minimizing or eliminating the need to dispatch technicians to customer premises.[74] Although we agree that this function improves efficiency, the extent of this efficiency is unclear. The record establishes that, while NYNEX can reduce the number of times technicians are dispatched, technicians must still travel to customer premises whenever line cards are added or changed on the multiplexer. In any event, this level of improved efficiency does not justify waiving the CPE unbundling rule.

35. From IDCMA's application for review, it also appears to us that competitively provided multiplexers could achieve comparable efficiencies. IDCMA has demonstrated that all service features associated with Enterprise can be offered to customers using competitively provided CPE on a comparably efficient basis, as long as NYNEX makes the required network disclosures regarding interconnection, as required by Section 68.110 of the Commission's rules, and permits competitively provided CPE to interconnect[75] with its central office Newbridges as do the customer-premises Newbridges. Furthermore, our rules do not prevent NYNEX from providing tariffed services that can be used together with an unbundled, unregulated customer-premises multiplexer so that the customer receives the same service as that provided in Enterprise.

36. Therefore, we overturn the Bureau's grant of a waiver to NYNEX to bundle multiplexers under Enterprise Transmittal 127.[76] We order NYNEX either to withdraw Enterprise service offered under Transmittal 127, or to replace the service with an unbundled version and to comply with the network disclosure requirements of Sections 68.110 and 64.702(d)(2), 47 C.F.R. §§ 68.110, 64.702(d)(2), by publishing interface standards for multiplexer interconnection and interoperation with Enterprise service. In either case, to prevent unreasonable disruptions of services, we will allow the waiver to remain in effect for the bundled arrangements of interstate customers[77] taking Enterprise service before the release of this order for a twelve-month transition period during which NYNEX can tariff unbundled service or customers can make plans for terminating service.

IV. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED that the Application for Review of Action Taken Pursuant to Delegated Authority, filed by Independent Data Communications Manufacturers Association, IS GRANTED to the extent indicated herein.

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[68] *Computer III, Phase II Reconsideration Order*, 3 FCC Rcd at 1167-68.
[69] NYNEX Opposition at 15-16.
[70] *Id.* at 4-6, 16.
[71] IDCMA Reply at 13 n.34.
[72] IDCMA Reply at 13-14.
[73] *See* note 53, *supra*.
[74] NYNEX Application at 11, 22.
[75] *See* para. 5, *supra*.
[76] In light of our holding, we need not reach the question of whether the 22-channel limitation is unreasonable.
[77] Customers taking only intrastate service may not add interstate circuits. During the twelve-month interim period, new circuits may be added under Transmittal 127 only if they are directly interconnected with customers covered by the waiver, pursuant to this Order.

38. IT IS FURTHER ORDERED, that the Application for Review, filed by NYNEX Telephone Companies, IS DENIED.

39. IT IS FURTHER ORDERED, that the Emergency Motion to Exceed Page Limitations, and the Motion for Leave to File, Out of Time, Emergency Motion to Exceed Page Limitations, filed by Independent Data Communications Manufacturers Association, IS GRANTED.

40. IT IS FURTHER ORDERED, that, within 10 days of the release of this order, NYNEX shall file provisions which limit Transmittal No. 127 to existing interstate Enterprise service customers, as defined in Paragraph 36 (and note 77) above. Those provisions shall also provide that service to such customers will be available for a period of twelve months from the day following the date of release of this order or until such time as NYNEX provides an unbundled version of Enterprise service pursuant to paragraphs 41, 42 and 43 below, whichever date occurs first.

41. IT IS FURTHER ORDERED, that NYNEX may elect to file tariff revisions to replace Transmittal No. 127 with an unbundled version of Enterprise service and to comply with paragraphs 42 and 43 below.

42. IT IS FURTHER ORDERED, that if NYNEX elects to provide an unbundled version of Enterprise service pursuant to paragraph 41 above, NYNEX shall file its tariff revisions to do so no later than 120 days before the expiration of the twelve-month interim service period described in paragraph 40 above.

43. IT IS FURTHER ORDERED, that if NYNEX elects to provide an unbundled version of Enterprise service pursuant to paragraph 41 above, NYNEX shall first comply with Sections 68.110 and 64.702(d)(2) of the Commission's rules, 47 C.F.R. §§ 68.110, 64.702(d)(2), by publishing interface standards for multiplexer interconnection and interoperation with Enterprise service, so that customers may provide their own multiplexers as CPE.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MM Docket No. 93-67

In the Matter of

Amendment of Section 73.202(b), RM-8114
Table of Allotments,
FM Broadcast Stations.
(Globe, Arizona)

ORDER

Adopted: October 18, 1993; Released: October 22, 1993

By the Assistant Chief, Allocations Branch:

1. The Commission, on its own motion, stays the October 25, 1993, effective date of the *Report and Order*, in the above-captioned proceeding, 8 FCC Rcd _____ (1993), 58 FR 48614 (September 17, 1993), which substituted Channel 247C3 for Channel 247A at Globe, Arizona, and modified the construction permit for Station KRXS(FM), Channel 247A, accordingly, in response to a proposal filed on behalf of Linda C. Potyka ("petitioner").

2. The *Notice* herein, 8 FCC Rcd 2222 (1993), stated that as Globe is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government to the proposal would be required. Our action in the *Report and Order* was premised on the staff's belief that the Mexican government's concurrence to the unopposed Globe modification proposal was imminent. It has recently come to our attention, however, that concurrence has been delayed.[1] Therefore, we are staying the effective date of the *Report and Order* until concurrence of the Mexican government is received.

3. Accordingly, pursuant to the provisions of Section 1.102(b)(3) of the Commission's Rules, IT IS ORDERED, That the action in the *Report and Order* in this proceeding establishing an October 25, 1993 effective date for the allotment of Channel 247C3 at Globe, Arizona, IS HEREBY STAYED pending the receipt of Mexican concurrence.

4. For further information concerning the above, contact Nancy Joyner, Allocations Branch, Mass Media Bureau, (202) 634-6530.

[1] We wish to clarify however, that this delay is not directed to the merits of this specific proposal, but rather is a generic approach to all unopposed concurrence requests currently pending before the Mexican government.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-266

In the Matter of

Review of the Pioneer's
Preference Rules

NOTICE OF PROPOSED RULE MAKING

Adopted: October 21, 1993; Released: October 21, 1993

Comment Date: November 15, 1993
Reply Comment Date: November 22, 1993

By the Commission: Commissioner Barrett dissenting in part and concurring in part and issuing a statement.

INTRODUCTION

1. By this action, the Commission initiates a review of its pioneer's preference rules to assess the effect of authority to assign licenses by competitive bidding recently enacted by Congress.[1] Now that the Commission's regulatory structure includes authority to select licensees from among mutually exclusive applicants by competitive bidding primarily as a substitute for random selection, this review considers whether the original basis and purpose of the rules continues to support the need for these rules. We consider: whether and how the rules might be amended to take into account competitive bidding and our experience administering the rules, or whether the rules should be repealed.

BACKGROUND

2. The pioneer's preference rules provide a means by which an applicant that demonstrates having developed a new communications service or technology may obtain a license to provide the new service or technology it has developed without being subject to mutually exclusive applications.[2] We adopted these rules to promote development of new technologies and services and to improve existing services. Our expressed rationale for these rules was that we would foster development of new technologies and services to the American public by reducing the delays and risks innovators otherwise faced in obtaining a license by either random selection or comparative hearing.

3. Under our pioneer's preference rules, an applicant may be granted a preference for a license if it demonstrates that it has developed a new service or technology; *i.e.*, that it has developed the capabilities or possibilities of the technology or service or has brought the technology or service to a more advanced or effective state. The applicant also must demonstrate that the new service or technology is technically feasible by submitting either a technical showing or results of an experiment.

4. Finally, a preference will be granted only if the final service rules adopted by the Commission are a reasonable outgrowth of the proposal and lend themselves to use of the proposed technology to provide service. An applicant meeting this standard is placed on a pioneer's preference track, is not subject to competing applications, and if otherwise qualified receives a license. Other applicants compete for additional licenses on a separate track.[3]

DISCUSSION

A. Effect of Competitive Bidding Authority

5. The pioneer's preference rules were established and have been used in the context of the Commission being limited to two procedures for selecting licensees from among mutually exclusive applicants: random selection and comparative hearings. In general, comparative hearings have tended to be time-consuming and costly for both potential licensees and the Commission, and have resulted in delays in providing service to the public. Accordingly, the Commission generally has favored the use of random selection for its licensing selection process. While the random selection method helps expedite licensing, however, it also lessens the chances that an innovator of a service or technology will be successful in obtaining a license due to the large number of speculative applications that often are filed. In 1991, the Commission concluded that absent a pioneer's preference, there was insufficient incentive for an innovative party to propose establishment of a new service or authorization of a new technology.

6. The Commission promulgated the pioneer's preference rules based upon a record indicating that the licensing process discouraged innovators from proposing new services or use of new technologies in existing services. Prosecuting petitions for the necessary rules changes was costly, the technology or concepts had to be disclosed to competitors in the process, and the chance of benefitting by obtaining a license to provide directly the service was small. Accordingly, the pioneer's preference rules were promulgated to create a significant incentive for innovators to submit proposals by providing a license to an otherwise-qualified innovator without subjecting it to mutually exclusive applications.

7. Establishment of competitive bidding authority creates

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[1] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 387, enacted August 10, 1993; Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rule Making* (FCC 93-455, released October 12, 1993).

[2] The pioneer's preference regulations are codified at 47 C.F.R. §§ 1.402, 1.403, 5.207 (1992). *See* Establishment of Procedures to Provide a Preference, *Report and Order*, 6 FCC Rcd 3488 (1991) (*Pioneer's Preference Report and Order*); recon. granted in part, *Memorandum Opinion and Order*, 7 FCC Rcd 1808 (1992); further recon. denied, *Memorandum Opinion and Order*, 8 FCC Rcd 1659 (1993) (*Pioneer's Preference Further Recon. Order*).

[3] *See also Pioneer's Preference Further Recon. Order*, 8 FCC Rcd at 1659.

a new dynamic for the assignment of licenses.[4] Specifically, a bidder, who may also happen to be an innovator, through its bidding efforts would primarily control whether it obtains the desired license. It may obtain the license directly by outbidding other mutually exclusive applicants, whether by using its own financial resources or by soliciting the aid of financial institutions and venture capitalists. One may conclude, therefore, that under this new scheme the value of innovation may be considered in the marketplace and measured by the ability to raise the funds necessary to obtain the desired license(s). Thus, we are concerned that competitive bidding authority may have undermined the basis for our pioneer's preference rules.[5] An applicant that has developed a new service or innovative technology for use in an existing service is now able to obtain directly a license if we authorize the requested service or technology and award licenses through competitive bidding.

8. However, when we promulgated the pioneer's preference rules, we recognized that innovators may be small entrepreneurs who find it difficult to obtain financial support for their proposals, even if innovative and beneficial. In this regard, we recognize that in authorizing competitive bidding Congress also required us to ensure that licenses are assigned among a wide variety of applicants, including small businesses.[6]

9. We note also that the statute explicitly provides that nothing in the competitive bidding provisions of the Act shall be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology.[7] That this statutory language refers to our pioneer's preference rules is confirmed in the Conference Report on the legislation.[8] We also note that the House Report on the bill expressed neutrality toward our pioneer's preference policy. The Report states:

> This [pioneer's preference] policy specifically has never been encouraged, nor discouraged, by an action taken by this Committee. To the "extent that this policy is consistent with the provisions of this section; other provisions of the Communications Act, hand other applicable law, the Commission is free to continue to implement such a policy. The Commission should not, however, view the Committee's neutrality as any type of blessing or approval of its policies. The provisions of section 309(j) are, again, expressly neutral with respect to these policies.[9]

10. Finally, we note that Congress authorized use of competitive bidding methods only when multiple applications are filed that are mutually exclusive.[10] Inasmuch as we have determined that a pioneer's preference application will be the sole application acceptable for filing for the specific license at issue,[11] we believe that the statutory language, combined with our pioneer's preference regulatory scheme as it currently exists, exempts pioneer's preference licensees from payment for a license so issued. Nevertheless, Southwestern Bell Corporation recently filed a letter in the 2 GHz broadband Personal Communications Services (PCS) proceeding in which it argues that the statute and rules do not necessarily result in a license being free for pioneer's preference grantees. In addition, other parties have filed petitions for reconsideration in the 900 MHz narrowband PCS proceeding arguing that the grantee therein should pay a fee equivalent to the auction value of the spectrum to prevent, *inter alia*, anti-competitive results.[12] If the rules are retained, we request parties to address whether we are legally permitted to charge for a license obtained through the pioneer's preference process, and if so, how that charge should be established.

11. Accordingly, based upon the discussion above, we solicit comment on whether our pioneer's preference rules continue to be appropriate in an environment of competitive bidding. We solicit comment on whether competitive bidding permits innovative parties to have a reasonable

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[4] We note that this authority will expire September 30, 1998. *See* Pub. L. No. 103-66, *supra* note 1 at Section 6002(a), to be codified at 47 U.S.C. § 309(j)(11).

[5] We are required to reexamine the public interest basis of rules when the basis asserted by the Commission no longer exists. *See Bechtel v. F.C.C.*, 957 F.2d 873, 881 (D.C. Cir. 1992) (subsequent history omitted); *Geller v. F.C.C.*, 610 F.2d 973 (D.C. Cir. 1979) (*per curiam*).

[6] Pub. L. No. 103-66, *supra* note 1 at Section 6002(a), to be codified at 47 U.S.C. § 309(j)(3)(B).

[7] *Id.*, to be codified at 47 U.S.C. § 309(j)(6)(G).

[8] H.R. Rep. No. 103-213, 103d Cong., 1st Sess. at 485 (1993) (Conference Report). At House hearings on competitive bidding authority witnesses addressing pioneer's preferences expressed approval of their purpose and belief that their continuance would be consistent in a regulatory scheme that included competitive bidding. For example, Jack Pellici of Oracle Corp. strongly endorsed pioneer's preferences and stated that pioneers should not be required to pay for the spectrum. *See Emerging Telecommunications Technologies*, Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, U.S. House of Representatives, 103d Cong., 1st Sess. at 98 *et seq.* (1993).

[9] H.R. Rep. No. 103-111 at 257.

[10] Pub. L. No. 103-66, *supra* note 1 at Section 6002(a), to be codified at 47 U.S.C. § 309(j)(1).

[11] *See Pioneer's Preference Further Recon. Order*, *supra* note 2 at 1659.

[12] In petitions for reconsideration or clarification of the *First Report and Order* in GEN Docket No. 90-314 and ET Docket No. 92-100, PageMart, Inc. states that Mtel should be required "to pay a minimum successful bid price for the license it will acquire by virtue of its pioneer's preference," *Petition for Reconsideration* at 14 (September 10, 1993); Paging Network, Inc. states that "it would be appropriate for the Commission to seek comment . . . the mechanism for determining the price which Mtel should pay in its upcoming auction rulemaking, notwithstanding the fact that the Commission has apparently concluded that Mtel will not be subject to competing applications," *Petition for Reconsideration and Clarification* at 20 (September 10, 1993); and Pacific Bell states that "the pioneer's preference licensee should be required to pay a fee equal to the lowest winning bid for the appropriate licensing area," *Petition for Clarification* at 2 (September 10, 1993). Southwestern Bell Corporation, in a letter filed in GEN Docket No. 90-314, states that "Requiring pioneers to be subject to auction pricing neither disadvantages them as compared to other licensees nor denies them the benefit of their preference," *Letter re: Personal Communications Services and Pioneer Preference Issues* at 3 (October 14, 1993). These submissions have been included in the file of this docket, and to the extent they address our pioneer's preference rules generically, will be considered in this proceeding in addition to the proceeding in which they were filed originally.

expectation of obtaining licenses. We also request comment on whether small businesses would be affected differently from other concerns by retention or repeal of the rules.[13]

12. Alternatively, we request comment on whether if we retain the preference rules, we should amend them to better work with our competitive bidding authority. Specifically, we solicit comment on alternatives to awarding licenses outright, such as simply designating pioneering parties in a report and order (R&O) establishing a new service or technology, but not guaranteeing these parties licenses. Under this approach, such parties would likely have increased opportunities with financial institutions and venture capitalists. As an added incentive, we could discount bids by designated pioneers by some specific amount or percentage. For example, if a pioneer submitted a winning bid, it might be required to pay only 75 percent of the bid.

B. Administrative Amendments to the Pioneer's Preference Rules

13. If we retain the pioneer's preference rules, we believe we should consider a number of administrative changes that may relieve both our staff and the public of unnecessary burdens. We believe that our current policy of issuing public notices specifying filing deadlines, considering raw experimental license material that relates to preference requests, and making initial determinations on pioneer's preference requests may burden unnecessarily both the Commission's staff and the public with no offsetting public benefit.

14. Currently, the deadline for filing pioneer's preference requests is established by a public notice issued at least 30 days in advance of the deadline date, and prior to the notice of proposed rule making (NPRM) regarding the subject service or technology.[14] We believe that issuance of this public notice in some instances has appeared to attract speculative requests. By definition, a telecommunications pioneer should be an entity that at an early stage of a technology's or service's development has been instrumental in influencing that development. Our experience with the pioneer's preference process convinces us that applicants should be required to file their request demonstrating an innovative contribution prior to Commission initiation of an inquiry or rulemaking proceeding.[15]

15. Our experience also convinces us that a pioneer's preference applicant should be required to incorporate only relevant experimental material into its preference request, rather than submitting its entire experimental file as part of the request. Since only a portion of the experimental file is relevant to the request, we believe that the applicants should select and explain the material that they submit. This change will better focus the preference requests and facilitate more meaningful comments by other parties.

16. Under the current scheme we make an initial determination on a request for pioneer's preference at the NPRM stage of a proceeding that addresses a new service or technology, and a final decision at the R&O stage.[16] We now propose a change in this procedure. Instead of making a tentative decision at the NPRM stage, comments could be filed on the pioneer's preference requests at the same time as the NPRM. As under our current rules, because pioneer's preferences involved adjudicatory matters that will implicate restricted *ex parte* rules if any requests are formally opposed, comments on the preferences would continue to be filed in separate pleadings. A decision on the preference requests would be made at the R&O stage. Eliminating the tentative decision stage would permit the Commission and the public to consider fully the pioneering efforts and technologies in conjunction with the proposed service, rather than making a tentative decision before determining the specifics of whether a service should be established or rules amended governing an existing service.

17. Finally, we propose to limit acceptance of pioneer's preference requests to services that use new technologies, and to clarify that innovative technology is a necessary basis for award.[17] We believe that merely using existing technologies to provide a new service is not innovative in the sense intended by pioneer's preferences. Our experience with pioneer's preferences convinces us that preferences should not be awarded for new services *per se*, but only for new technologies used to provide new services or that significantly improve existing services. As technology progresses, higher frequency bands consistently become economically viable for new services. Transferring a technology from an existing service in a lower band to a "new" service in a higher band should not be recognized by award of a pioneer's preference.

C. Existing Pioneer's Preference Requests

18. From the time the rules were adopted in 1991, the Commission has awarded two pioneer's preferences in two different services. The first pioneer's preference was granted to Volunteers in Technical Assistance (VITA) in the non-voice, non-geostationary (NVNG) mobile satellite service below 1 GHz. VITA established that it was the first to develop and demonstrate the feasibility of using a low-Earth orbit (LEO) satellite system on VHF/UHF frequencies for civilian digital message communications purposes. The second grant was made to Mobile Telecommunication Technologies Corporation (Mtel) in the 900 MHz narrowband PCS proceeding for having demonstrated its development of an innovative technology that will result in new service to the public and increase spectrum efficiency.[18] Disposition of pioneer's preference requests in these two proceedings already were made before Congres-

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[13] Comments on this issue should take into account our proposals relating to small businesses in our proceeding to adopt competitive bidding rules, *supra* note 1.

[14] 47 C.F.R. § 1.402(c) (1992).

[15] For purposes of our proposal, Commission adoption of either a Notice of Inquiry or an NPRM would constitute initiation of the proceeding.

[16] *47 C.F.R. § 1.402(d) (1992).*

[17] As discussed at para. 37 of the *Pioneer's Preference Report and Order*, note 2 *supra*, we will not award a preference for a new technology unless that technology is associated with a licensable service.

[18] *See Report and Order*, ET Docket No. 91-280, 8 FCC Rcd 1812 (award to VITA); and *First Report and Order*, GEN Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162 (1993), (award to Mtel), *petitions for reconsideration and clarification pending, appeals pending sub nom. BellSouth Corp. v. FCC*, No.

sional enactment of competitive bidding authority, and as a matter of equity, nothing in this review will affect these proceedings.[19]

19. We also have pending four pioneer's preference tentative grants in two services. In the 2 GHz broadband PCS proceeding, we tentatively concluded that pioneer's preferences should be awarded to three applicants; and in the 28 GHz local multipoint distribution service (LMDS) proceeding we tentatively concluded that one applicant should be awarded a preference.[20] We ask for comment on whether any repeal or amendment of our rules should apply to these proceedings.

20. Finally, approximately twelve requests remain before us for which tentative decisions have not been issued. We propose that any repeal or amendment of our rules apply to these proceedings and request comment on this conclusion.

CONCLUSION

21. In view of our new authority to use competitive bidding to assign licenses and our experience administering the pioneer's preference rules, we initiate this review of the purpose and basis for the pioneer's preference rules and their operation. We believe that these rules must be reexamined with respect to competitive bidding authority, but express no conclusion as to whether they should be repealed or modified. We seek comment on all aspects of these rules. With respect to our experience administering the rules, if the rules are continued, we propose changes to improve their administration. During the pendency of this proceeding, we will not rule on any pioneer's preference requests now before us in proceedings in which a pioneer's preference request has not already been granted. In order not to delay the licensing of 2 GHz PCS, we intend to adopt a Report and Order in the instant proceeding expeditiously, and any necessary Order regarding 2 GHz PCS pioneer's preferences in advance of or at the same time that we adopt a Report and Order in our competitive bidding proceeding, which by statute must be no later than March 8, 1994.

PROCEDURAL INFORMATION

Regulatory Flexibility Act

22. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1988).

Ex Parte Rules

23. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a) (1992). We note, however, that many pioneer's preference requests have been formally opposed, and in these proceedings, no *ex parte* presentations are permitted until final Commission decisions regarding the preference requests are made and are no longer subject to reconsideration by the Commission or review by any court.

Comment Dates

24. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419 (1992), interested parties may file comments on or before November 15, 1993, and reply comments on or before November 22, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of comments, you must file an original and nine copies. Comments and reply comments must be sent to the Office of Secretary, Federal Communications Commission, Washington, DC 20554. These comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington DC 20554. The complete text of this *Notice of Proposed Rule Making* also may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, N.W., Room 236, Washington DC 20554; telephone (202) 857-3800.

Authority

25. This action is taken pursuant to Sections 4(i), 7(a), 303(c), 303(f), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(f), 303(g), 303(r), and 309(j).

93-1518 (D.C. Cir. filed August 20, 1993) and *Freeman Engineering Associates, Inc. v. FCC*, No. 93-1519 (D.C. Cir. filed August 23, 1993).

[19] Applications currently pending in the NVNG service are not mutually exclusive and therefore cannot be subject to assignment using the competitive bidding process, *see Competitive Bidding Notice, supra* note 1. Although we have proposed that mutually exclusive applications in the 900 MHz narrowband PCS service be assigned using the competitive bidding process, *id.*, we conclude that it would be inequitable to apply any change in our rules in that pioneer's preference proceeding.

[20] *See Tentative Decision and Memorandum Opinion and Order*, GEN Docket No. 90-314, 7 FCC Rcd 7794 (1992) (pioneer's preferences tentatively awarded to American Personal Communications, Cox Enterprises, Inc., and Omnipoint Communications, Inc. in the 2 GHz PCS proceeding); and *Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration*, CC Docket No. 92-297, 8 FCC Rcd 557 (1993) (pioneer's preference tentatively awarded to Suite 12 Group in the 28 GHz LMDS proceeding). In the *Notice of Proposed Rule Making and Tentative Decision* in the above 1 GHz LEO satellite proceeding, ET Docket No. 92-28, 7 FCC Rcd 6414 (1992), we tentatively proposed to award no pioneer's preferences.

Contact Person

26. For further information concerning this proceeding, contact Rodney Small, (202) 653-8116, Office of Engineering and Technology.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix

Initial Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals contained in this NPRM. We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines provided above.

A. Reason for Action.

This rule making proceeding is initiated to obtain comment regarding possible modifications to, or repeal of, the pioneer's preference rules.

B. Objectives.

The Commission seeks to review the public interest basis for its pioneer's preference rules in light of recently enacted statutory authority to assign licenses by competitive bidding and its experience administering the rules since 1991.

C. Legal Basis.

The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r), and 303(j), and Section 6002 of the Omnibus Budget Reconciliation Act of 1993, to be codified at 47 U.S.C. § 309(j).

D. Reporting, Recordkeeping and Other Compliance Requirements.

None.

E. Federal Rules That Overlap, Duplicate, or Conflict With These Rules.

None.

F. Description, Potential Impact, and Number of Small Entities Involved.

The rule changes proposed could affect small businesses if they have pioneer's preference requests pending, if they contemplate filing pioneer's preference requests, or if they intend to file applications for services in which others might receive a pioneer's preference. We do not intend to take any action that would unnecessarily lessen the ability of small businesses to participate in services that use new technologies. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent With the Stated Objectives.

The NPRM discusses a range of options for repeal or amendment of the pioneer's preference rules. We solicit comment on the options that would be preferable for small entities.

STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT
DISSENTING IN PART/CONCURRING IN PART

In Re: Review of the Pioneer's Preference Rules

This Notice of Proposed Rulemaking [Notice] undertakes a complete review of the merits of pioneer preference rules under our new authority to issue licenses through competitive bidding. This item also confirms the grant of pioneer preferences to VITA and Mtel in prior proceedings concerning Low-Earth Orbit mobile satellite services below 1 GHz and narrowband Personal Communications Services[PCS], respectively. The Notice puts all remaining pioneer preferences in a "limbo status" pending a decision to totally repeal all pioneer preference rules, or amend the rules in the context of competitive bidding. Due to the analytical inconsistencies apparent in this item, and the extreme inequity of refusing to decide the pioneer preference issues in the 2 GHz PCS docket [90-314], I dissent to portions of this Notice that propose to repeal the pioneer preference rules, and delay or possibly repeal the grant of pioneer preferences in the 2 GHz PCS docket.[1] To subject pioneer preference applicants in the 2 GHz PCS docket to possibile repeal of these rules at this late date, is neither reasonable or necessary. In the face of what I predicted would be a difficult decision due to the serious flaws of the PCS Order, the majority has retreated from making tough decisions on which license to grant a broadband PCS pioneer. At least in the PCS Order, some decision was made. This action is an apparent retreat from any decision in the 2 GHz PCS pioneer preference item. Given the millions of dollars spent by numerous large and small entities to provide experimental PCS information and innovative service concepts, I believe this action constitutes the ultimate public policy "bait and switch".[2]

I dissent to this action as a matter of public policy and as a matter of equity for four reasons:

[1] I also dissent to this item because it delays the future grant of a pioneer preference in the Local Multipoint Distribution Service [LMDS] at 28 GHz, subject to possible repeal of the rules. See Notice at 9, n 20.

[2] The Commission received 96 pioneer preference requests in the 2 GHz PCS docket. OET accepted 57 of these applications. The Commission tentatively selected 3 of these applications. As of July 1993, the FCC had granted 188 experimental PCS licenses in markets throughout the country.

1. The 1993 Omnibus Budget Reconciliation Act [Act], portions of which granted the Commission competitive bidding license authority, does not prevent the Commission from awarding licenses to "those persons who make significant contributions to the development of a new telecommunications service or technology.[3] The Act also provides the Commission with discretion to pursue competitive bidding licensing schemes without basing a public interest finding on the expectation of Federal revenues.[4] Based on this language, it is not clear that competitive bidding either alters the Commission's ability to grant pioneer preferences, or requires us to account for competitive bidding revenues if the pioneer is not required to pay for the license. Thus, as a matter of public policy, the Commission currently has the discretion to go forward with its pioneer preference rules and grant pioneer preferences to applicants in the 2 GHz PCS docket [90-314] or in any other future dockets. I dissent to the extent that we utilize this policy discretion to propose the possible repeal of these rules due to the competitive bidding process.

2. The pioneer preference rules give small businesses and rural companies an incentive to engage in research and development process for new services or technologies, particularly in the context of competitive bidding. I do not believe there is a sound public policy rationale for hindering potential avenues for small business participation through the pioneer preference process. The Omnibus Act requires that the Commission provide economic opportunties for small businesses and rural telephone companies to participate in spectrum-based services.[5] Since these statutory provisions are included in the Act's competitive bidding language, I believe we should continue to grant pioneer preferences, particularly where small businesses and rural companies have additional incentives to participate. Further, I believe that granting a pioneer preference, without requiring payment for the license, is consistent with this goal. The capital costs projected for PCS could be prohibitive to small businesses in the competitive bidding context, particularly where they also seek to provide the Commission with innovative service or technology applications.[6] Thus, I believe that the grant of a pioneer preference further enables small businesses to participate in all apsects of our dockets for new and emerging services.

3. I believe the Commission was aware of the potential for competitive bidding authority at the time it made a final selection of Mtel in the narrowband PCS docket; and at the time it tentatively designated APC, Cox and Omnipoint as pioneer selectees in the 2 GHz PCS docket [90-314].[7] In July 1992, the Commission issued a Notice of Proposed Rulemaking that acknowledged the potential for competitive bidding as a licensing scheme for PCS.[8]

In October 1992, the Commission issued a Tentative Decision and Memorandum Opionion and Order in the PCS docket which selected APC, Cox and Omnipoint as tentative pioneer preference selectees from among 57 evaluated applicants. This decision was made subsequent to the July 1992 PCS Notice, and continued to contemplate the potential for competitive bidding of PCS licenses.[9] I believe it is both inconsistent and contradictory to suggest, at this late date, that the Commission is suddenly confused about pioneer preferences in the competitive bidding context. The June 1993 decision to grant Mtel a pioneer preference was clearly made while acknowledging the need to develop competitive bidding rules for narrowband PCS. Our September 1993 Notice of Proposed Rulemaking to implement competitive bidding clearly delineates narrowband PCS for this licensing scheme.[10] Thus, a proposal to repeal the rules at this late date, and possibly grant no further preferences, is inconsistent with our past recognition of the prospects for competitive bidding. Further, with respect to the broadband PCS docket, the Commission now must ignore its past recognition of the possibilities for competitive bidding at the time it tentatively selected APC, Cox and Omnipoint. Thus, I am absolutely confused by the decision to avoid a pioneer preference decision in the broadband PCS docket. I dissent to this aspect of the Notice, given the clear inconsistencies involved in a "no vote" decision.

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[3] This provision was added in Conference from a Senate amendment which included provisions concerning our Pioneer Preference rules. For statutory basis, see generally Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, 107 Stat. 387, enacted August 10, 1993 and H.R. Report No. 103-111, 103d Cong. 1st Sess. at 11 (1993) (hereafter Omnibus Budget and Conference Report).

[4] Omnibus Budget and Conference Report, §§ 309(j)6, 309(j)7.

[5] Id. at §§ 309(j)3, 309(j)4.

[6] The effects of sudden changes on the regulatory structure for emerging technologies can be unsettling; particularly in areas that effect capital formation. During our earlier debates on the number of licenses to be issued in the spectrum allocation, one ex parte contact argued,"[w]ith the introduction of [multiple licenses], assuming equal market shares, the capital investment per subscriber for Cablevision's alternative architecture climbs to $1,360 for partial residential/street coverage and $2,422 for ubiquitous residential/street coverage. Remembering that this comparison only includes the incremental radio delivery and support electronics of an otherwise PCS ready cable plant, and does not include capital costs for switching, billing, plant make ready, additional primary and standby power supplies, auction license acquisition investments, or capital outlay to relocate OFS users, the economic viability of [multiple] licensees is highly doubtful." *See* In re Cablevision Systems Corporation Analysis of Capital Costs of PCS Networks, *Notice of Ex Parte Presentation*, Gen. Dkt. No. 90-314 (September 15, 1993).

[7] Our June 24, 1993 decision to authorize narrowband PCS services, included a *nationwide* license pioneer preference award to Mtel for its pioneering efforts. This item denied pioneer preference requests for 18 other entities. The Order granted this pioneer preference while acknowleding that the House and Senate had passed legislation authorizing competitive bidding for licenses, such as narrowband PCS. In the Matter of Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, *First Report and Order*, Gen. Dkt. No. 90-314 (June 24, 1993) paragraphs 62 to 72 and same, Andrew C. Barrett issuing separate statement. (June 24, 1993) (discussing the need to address impact of auctions on small business entities who seek PCS licenses.) See also, Separate Statement of Commissioner Andrew C. Barrett, June 24, 1993, in docket ET 92-100 and Gen Docket 90-314.

[8] In re Personal Communications System, Notice of Proposed Rulemaking, Gen. Dkt. No 90-314, Et Dkt. 92-100 (Andrew C. Barrett issuing separate statement) (July 16, 1993) (discussing the need to address impact of auctions on small business entities who seek PCS licenses.)

[9] In re Implementation of Section 309(j) of the Communications Act of 1992; Competitive Bidding, Notice of Proposed Rulemaking, (October 12, 1993) FCC 93-455.

[10] Id. (Andrew C. Barrett issuing separate statement.)

4. If the PCS Order had granted more rational, consistent allocations of PCS licenses in each market, instead of the unfocused variety of licenses presently available, I believe a pioneer preference decision in the 2 GHz docket would have been easier. Instead, the majority is now stuck with a labyrinth of wider areas licenses and miniscule licenses with uneconomic spectrum sizes. As a result, the consternation over which licenses to grant broadband PCS pioneers will apparently continue to be a problem. As I indicated in my dissent to the PCS Order, I believe pioneer preference selectees should receive significant allocations in terms of market size and spectrum. Since we already have granted Mtel a nationwide PCS license for narrowband service, apparently without requiring any payment, I do not understand the majority's dilemma in granting a regional license block to any pioneer preference selectees in the broadband PCS service. Perhaps if we can arrive at a better allocation scheme for broadband PCS services upon reconsideration, the Commission will find itself able to make an affirmative decision in this regard.

To the extent this item seeks to refine the current pioneer preference rules, and considers flexibility to grant additional pioneering designations, I concur. However, I do not believe these proposals should have been the basis for avoiding a pioneer preference decision in the 2 GHz PCS docket. As with our decision regarding Mtel, I believe the Commission is presently in a position to proceed with a pioneer preference order in the broadband PCS docket.[11]

[11] For prevailing arguments in favor of our ability to render a decision in this docket, see In Re Personal Communication Service/Pioneer Preference Issues, *Notification of Ex Parte Presentation, Omnipoint* Corporation, Gen. Dkt. 90-314 (September 29, 1993) at 7,8; In Re Personal Communication Service/Pioneer Preference Issues, *Notification of Ex Parte Presentation, Cox Enterprises, Inc.*, Gen. Dkt. 90-314 (September 28, 1993) at 2; In Re Personal Communication Service/Pioneer Preference Issues, *Notification of Ex Parte Presentation, Cox Enterprises, Inc.*, Gen. Dkt. 90-314 (September 28, 1993) at 2.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 93-1211

October 6, 1993

COMMENTS SOLICITED REGARDING EMERGENCY ALERTING SYSTEMS TEST RESULTS IN FO DOCKETS 91-301/91-171

The Commission has completed formal field testing of proposed enhanced emergency alerting systems involved in FO Dockets 91-301/91-171. Proposed standards for the modernization of the Emergency Broadcast System (EBS) were outlined in the FCC's Notice of Proposed Rulemaking/Further Notice of Proposed Rulemaking, FO Docket 91-301/91-171, adopted by the Commission on September 17, 1992 and released on October 8, 1992. The Commission is proposing updating emergency alerting equipment to improve its early warning capacity and to make it compatible with cable systems and other new and future communications technologies.

The Western field testing was held June 27th through June 30th, 1993, in Denver, Colorado. The Eastern field testing was held September 12th through September 15th, 1993 in Pikesville, Maryland. The results of the field tests have been condensed to two documents of approximately 500 pages each. They are entitled "Western" and "Eastern" Field Tests and are divided into (1) Plenary meetings, (2) Field testing, (3) Final reports, and (4) Miscellaneous.

Interested parties are invited to review the test results and file comments on or before November 12, 1993. Reply comments must be filed by November 26, 1993. Comments and reply comments filed in the docket must conform to the requirements of the Commission's Rules. Copies of the Western and Eastern field tests results are available for review in the Commission's Docket Branch, Room 230, or may be obtained from the Commission's copy contractor, International Transcript Service, Room 246, (202) 857-3824. Additional copies of the tests results and the voluminous supporting documents are available for review in the EBS office, 1919 M St. NW, Room 720.

Any questions regarding this Public Notice may be directed to the EBS staff at (202) 632-3906.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-451
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	GEN Docket No. 90-314
Rules to Establish New Personal	)	
Communications Services	)	RM-7140, RM-7175, RM-7618

SECOND REPORT AND ORDER

Adopted: September 23, 1993; Released: October 22, 1993

By the Commission: Commissioner Barrett dissenting and issuing a statement; Commissioner Duggan issuing a statement.

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I. INTRODUCTION

1. By this action, the Commission establishes regulations for a new Personal Communications Service (PCS).[1] The creation of this new service is a major action that will make available a broad range of new services and technologies to both business users and consumers. The regulations we are adopting today include spectrum allocations, licensing/authorization rules and technical standards for both licensed and unlicensed PCS operation. Issues regarding licensee selection procedures and the regulatory status of the service are the subject of recent legislation and are being addressed in separate proceedings.[2] The regulatory plan embodied in the new PCS rules will provide licensees and developers of unlicensed equipment the maximum degree of flexibility to introduce a wide variety of new and innovative telecommunications services and equipment.

2. The advent of PCS is expected to have a great impact on the future development and configuration of all telecommunications networks by improving significantly their flexibility and functionality. Many PCS applications have the potential to create new markets and to provide competition in others for the first time. PCS also will raise the overall level of competition in many already competitive segments of the telecommunications industry. The many applications of PCS also are expected to increase productivity and efficiency across a broad array of industries and have a positive impact on the international competitiveness of the Nation's economy.

II. BACKGROUND

A. Commission Actions on PCS

3. The Commission began its investigation of PCS in 1989, in response to several petitions for rule making.[3] Over the

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[1] This decision addresses PCS services in the 2 GHz band. In a recent action we allocated spectrum and adopted rules for operation of narrowband PCS in the 900 MHz band. See First Report and Order, GEN Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162 (1993).

[2] See paras. 10-13, infra.

[3] Petitions for Rule Making requesting establishment of PCS were filed by Cellular 21, Inc., in September 1989, RM-7140; and PCN America, Inc. (PCN America), in November 1989, RM-7175. Subsequently, in February 1991, Apple Computer, Inc., RM-7618, proposed that 40 MHz from the 1850-1990 MHz band be allocated for unlicensed high-speed local-area data communications services

course of four years the Commission has issued a Notice of Inquiry, a Policy Statement and Order, a Notice of Proposed Rule Making and Tentative Decision, and a Tentative Decision and Memorandum Opinion and Order, held an en banc hearing that addressed PCS, and allocated spectrum for emerging technologies, including PCS.[4] The Commission also made recommendations and participated in international allocation decisions that recognize and permit use of this spectrum for PCS.[5] Various telecommunications companies also have been active in participating in our PCS proceedings, and over 100 companies are conducting more than 220 experiments pursuant to experimental licenses to develop and test PCS services and technologies.

4. In the Notice of Proposed Rule Making and Tentative Decision (Notice) in this proceeding, we observed that the increasing availability of mobile and personal communications is freeing business and residential consumers from the constraints of the wired telecommunications network. In light of the strong and increasing interest in developing these new types of services, we tentatively concluded that establishment of a new PCS service was warranted.

5. In proposing to establish this new service, we stated that it is essential that the PCS spectrum and regulatory structure furnish PCS providers the ability to reach and serve existing and new markets in an economic and responsive manner.

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connecting personal computers.

[4] See Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, GEN Docket No. 90-314, 6 FCC Rcd 6601 (1991); Notice of Proposed Rule Making and Tentative Decision, GEN Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 (1992); Erratum, 7 FCC Rcd 5779 (1992); and Tentative Decision and Memorandum Opinion and Order, GEN Docket No. 90-314, 7 FCC Rcd 7794 (1992).

[5] A worldwide allocation for PCS was discussed at the 1992 International Telecommunication Union (ITU) World Administrative Radio Conference (WARC-92) in Torremolinos, Spain. The conference decided to maintain the primary fixed and mobile allocations at 2 GHz in Region 2, to add additional mobile-satellite service allocations in the 1930-2010 and 2120-2200 MHz bands, and to add a footnote stating that future public land mobile telecommunications systems, which are similar in concept to PCS, are expected to use the 1885-2025 MHz and 2110-2200 MHz bands on a worldwide basis. See Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1991); ITU, Final Acts of the World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum (Malaga-Torremolinos, 1992).

We further stated that, consistent with the goals of the Communications Act, we intend to ensure that all mobile services are provided with the highest quality at reasonable rates to the greatest number of consumers. Our experience with mobile communications, as well as information about the developing PCS services, led us to conclude that we should attempt to optimize and balance the following four objectives in providing spectrum and a regulatory structure for PCS: universality; speed of deployment; diversity of services; and competitive delivery.

6. In the Notice, we set forth proposals addressing the various regulatory issues that must be resolved in order to establish a PCS service at 2 GHz.[6] The issues addressed include:

- the definition of PCS;
- spectrum allocations at 2 GHz;
- the amount of spectrum to be provided for PCS licensees and for unlicensed PCS operations;
- the number of PCS providers to be licensed;
- the size of licensed PCS service areas;
- eligibility requirements for licensees;
- licensing mechanisms;
- regulatory classification of PCS providers;
- technical standards;
- environmental RF exposure hazards; and,
- international issues.

More than 150 parties submitted comments and/or reply comments in response to the Notice.

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[6] In the Tentative Decision and Memorandum Opinion and Order in this proceeding, supra note 4, we considered 56 requests for pioneer's preferences associated with this docket and tentatively concluded that three might merit preferences -- American Personal Communications, Cox Enterprises, Inc., and Omnipoint Communications, Inc. Because of the complexity of the issues in this docket we have not had an opportunity to complete our review of the preference requests. We also have not completed our consideration of the relationship of recently-enacted competitive bidding authority to PCS licensing and to the pioneer's preference program. Accordingly, although our rules contemplate final rulings on the requests at the report and order stage, see 47 C.F.R. § 1.402(d), we do not rule on these requests today.

B. Emerging Technologies Spectrum

7. On September 17, 1992, the Commission allocated 220 MHz of spectrum between 1850 and 2200 MHz to meet the spectrum requirements of innovative new services, such as PCS, made feasible by emerging technologies.[7] In taking this action, the Commission found that allocating spectrum for emerging technologies would further its Congressional mandate to encourage the provision of new technologies and services to the public,[8] and encourage the larger and more effective use of radio in the public interest.[9] More recently, the Commission rechannelized higher frequency fixed microwave bands to accommodate the existing 2 GHz facilities and completed the details of a transition plan for sharing with or relocating to other spectrum existing 2 GHz fixed microwave facilities.[10]

C. PCS Experiments

8. The Commission has authorized over 220 PCS experimental licenses in the past four years. These experimental licensees are developing and testing equipment in several different frequency bands. A number of the experimental licensees also are performing market studies related to a variety of technologies and service concepts. The services or devices being tested include CT-2, CT-2 Plus, CT-3, PCN, wireless private branch exchange (PBX), and wireless local loop.[11]

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[7] See First Report and Order and Third Notice of Proposed Rule Making in ET Docket No. 92-9, 7 FCC Rcd 6886 (1992).

[8] 47 U.S.C. § 157.

[9] 47 U.S.C. § 303(g).

[10] See Second Report and Order, ET Docket No. 92-9 (rechannelization), 8 FCC Rcd 6495 (1993), and Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9 (transition plan), 8 FCC Rcd 6589 (1993).

[11] The acronym CT-2 stands for a "cordless telephone, second generation." A CT-2 device is a digital telephone that functions as a cordless telephone at home and in the office, but additionally can be used as a portable pay phone to initiate calls when in range of a CT-2 microcell (known as a "telepoint"). CT-2 Plus is CT-2 service with the ability to switch calls between cells in low-speed environments and the ability to receive and display paging messages. CT-3, which stands for "cordless telephone, third generation," includes control channels that permit the handset to receive as well as to initiate calls. PCN is a proposed advanced voice and data communications system

9. The modulation schemes and access technologies being tested include time division duplex (TDD), frequency division multiple access (FDMA), time division multiple access (TDMA), and narrowband and broadband spread spectrum technologies with associated code division multiple access (CDMA) technology.[12] The majority of PCS experiments are being conducted at 2 GHz, although some limited experimentation is being conducted in other bands.[13] The stage of testing and progress of individual experiments varies. Some licensees are only in the early planning stage of their experiments. Other licensees are conducting propagation tests to determine coverage areas,[14] developing computer models to determine geographic areas where sharing and coordination with existing microwave operations will be required,[15] and performing market studies to determine

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that would be independent of, but permit connection to, the existing wireline public switched telephone network and cellular systems. Wireless PBX service is proposed to permit telephone portability in office environments, and wireless local loop service could replace the "last mile" to the home with a radio link.

[12] TDD is a technology which permits transmission and reception on the same frequency channel by allocating alternating time slots for transmission and reception. FDMA is a communications technique that divides the bandwidth of a frequency assignment into separate channels for communications among multiple users by allocating a specific channel to each user. TDMA is a communications technique that utilizes a common channel for communication among multiple users by allocating a specific time slot to each user. CDMA is a communications technique that utilizes a common channel for communications among multiple users by allocating a specific code to each user. It employs a form of modulation whereby digital information is encoded in an expanded bandwidth format. Several transmissions can occur simultaneously within the same bandwidth with the mutual interference reduced by the unique codes used in each transmission. It permits a high degree of energy dispersion in the emitted bandwidth.

[13] For example, American Telephone and Telegraph Company (AT&T) is conducting experiments in the 6 GHz band (File Numbers 2089-EX-PL-91, 2090-EX-PL-91, and 2091-EX-PL-91) and some cable companies are experimenting, but have not reported results, in the 12 GHz Cable Antenna Relay Service (CARS) band.

[14] Many of the experimental licensees have done 2 GHz propagation testing.

[15] For example, APC, Pacific Telesis Group (PacTel), and PCN America.

consumer demands for PCS-type services.[16] Others are in the process of testing or have finished testing complete systems at 2 GHz using a variety of technologies.

D. Legislative Developments

10. After we adopted the Notice, the Omnibus Budget Reconciliation Act of 1993 (Budget Reconciliation Act) was enacted.[17] This statute addresses the method by which PCS licenses can be awarded and the regulatory treatment of PCS services.

11. Section 6002 of the Budget Reconciliation Act authorizes the Commission to employ competitive bidding procedures to choose from among mutually exclusive applications for licenses to use the electromagnetic spectrum, provided that the Commission determines that the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers for the use of those frequencies. In authorizing the use of competitive bidding procedures, Congress directed the Commission to promote the objectives set forth in Section 1 of the Communications Act.[18] Additionally, when designing systems of competitive bidding, Congress directed the Commission to provide safeguards that

> will promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentrations of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.[19]

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[16] For example, APC, Ameritech, and Southwestern Bell Corporation.

[17] Pub. L. No. 103-66, 107 Stat. 312.

[18] Section 1 states, inter alia, that the purpose of the Act is to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." See 47 U.S.C. § 151.

[19] See Section 6002(a), Budget Reconciliation Act, to be codified at 47 U.S.C. § 309(j)(3)(B).

The Commission is directed to adopt competitive bidding procedures by rule making within 210 days of enactment of the Budget Reconciliation Act.[20] In a separate Notice of Proposed Rule Making adopted today, we are proposing rules to implement this competitive bidding authority.[21]

12. The Budget Reconciliation Act also amends Sections 3(n) and 332 of the Communications Act to create a comprehensive framework for the regulation of mobile services. Congress directed that personal communications services established pursuant to this docket are to be classified as mobile services as defined by Section 3(n) as amended.[22] Under revised Section 332, mobile services consist of commercial mobile services and private mobile services. Commercial mobile services are defined as those services provided for profit and which make interconnected service available to the public or to such classes of eligible users as effectively to be available to a substantial portion of the public. The Commission is directed to treat such services as common carriers pursuant to the Act, subject to Commission authority to forbear from application of certain sections of Title II of the Act.[23] In a separate Notice of Proposed Rule Making adopted today we are proposing rules that will implement these amendments to Sections 3(n) and 332 of the Communications Act.[24] The Commission is directed to implement the mobile service provisions within one year of enactment,[25] but insofar as those changes relate to PCS, we are directed to implement regulations within 180 days of enactment.[26]

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[20] See Section 6002(d), Budget Reconciliation Act.

[21] See Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rule Making, FCC 93-455 (released October 12, 1993).

[22] See Section 6002(a)(2)(B)(ii)(I), Budget Reconciliation Act, to be codified at 47 U.S.C. § 153(n).

[23] See Section 6002(b)(2)(A)(iii), Budget Reconciliation Act, to be codified at 47 U.S.C. § 332(c)(1).

[24] See Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Notice of Proposed Rule Making, FCC 93-454 (released October 8, 1993).

[25] See Section 6002(d)(3), Budget Reconciliation Act.

[26] See Section 6002(b)(2)(A)(iii), Budget Reconciliation Act, to be codified at 47 U.S.C. § 332(c)(1)(D).

13. The Budget Reconciliation Act also directs the Commission to issue a final report and order in this docket by February 6, 1994, and to commence issuing PCS licenses by May 7, 1994.[27]

III. DISCUSSION

A. Need For PCS

14. In the Notice, we observed that personal communications requirements are changing rapidly as our society becomes more mobile and the demand for near instantaneous communications and universal access increases. We also noted that PCS could provide competition to existing mobile services, including cellular, paging and private radio services.[28] We further observed that the international community appears to be moving toward allocations for PCS-type communications in the 1800-2200 MHz range. Based on these considerations, we stated that we believe the establishment of PCS is warranted and proposed to allocate spectrum for PCS and institute rules to allow the widest possible range of PCS services.

15. The commenting parties strongly support our initial assessment of the need to establish a new PCS service and the potential benefits to businesses and the general public of the wide variety of specific services that would be operated under such a service designation. These parties generally agree that PCS will be a pivotal component of the evolving communications infrastructure of the United States. In this regard, American Personal Communications (APC) states that PCS will be of far-reaching importance to our economy and our ability to compete in the international communications market place. APC and Comcast PCS Communications, Inc. (Comcast) state that PCS will bring the freedom, security and efficiency of personal communications to millions of subscribers who have been foreclosed from participating in the wireless revolution of the past decade. The Cellular Telecommunications Industry Association (CTIA) similarly submits that wireless communications are increasingly becoming a critical part of improving and advancing our nation's telecommunications infrastructure and points to the success of the cellular service to support its claim.

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[27] See Section 6002(d)(2), Budget Reconciliation Act. We believe that this Second Report and Order, which adopts the spectrum allocation and operating and licensing regulations for PCS, meets the statutory deadline for this docket. We previously met the deadline for ET Docket Nos. 92-9 and 92-100, see notes 10 and 1 respectively.

[28] Notice, supra note 4 at para. 26.

16. Some parties provide estimates of future demand for PCS services. Telocator submits a study concluding that the PCS market could be from 60-90 million subscribers by the year 2002.[29] Motorola Inc. (Motorola) estimates that PCS will have the capability to serve more than 150 million domestic wireless users by the year 2000. APC and California Microwave, Inc. (California Microwave) submit that the PCS industry will create hundreds of thousands of new jobs for our economy, save consumers billions of dollars by providing competition to the cellular service, enhance productivity, and provide the United States with an unparalleled opportunity to lead the world in a $195 billion international industry.

17. We continue to believe there is need to establish a new PCS service and to provide spectrum for its operation. We find that there is increasing business and consumer demand for new mobile services and technologies. The record provides strong evidence that there is interest in new mobile services and advanced technologies that offer the ability to communicate with individuals directly wherever they may be, rather than to a specific geographic point. From our observations in the Notice and the statements of the parties participating in this proceeding, we conclude that establishment of a new PCS service will benefit the American public by creating an industry that will offer a diverse array of services.

18. Moreover, the new PCS industry is expected to compete with the existing cellular and private advanced mobile communications services, thereby yielding lower prices for existing users of those services. In addition, establishment of a PCS service will promote the development of a wide range of services and devices such as smaller, lighter multi-function portable phones; portable facsimile and other imaging equipment; multi-channel cordless phones; and wireless PBXs. Finally, the development of PCS services will permit U.S. industry to develop services and technologies for international markets. Accordingly, we conclude there is a need to establish a new PCS service and to allocate spectrum for its operation as well as provide spectrum for unlicensed PCS devices.

B. Service Definition

19. In the Notice, we proposed to define PCS as a family of mobile or portable radio communications services that could provide services to individuals and business and be integrated with a variety of competing networks. We further proposed that

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[29] Telocator comments at Appendix A. This study is based on a survey of industry experts.

spectrum allocated for PCS not be used for broadcasting services[30] and that fixed services generally be allowed only as ancillary to mobile PCS services. In June we adopted this definition for application to narrowband PCS services to be provided at 900 MHz.[31]

20. Most of the commenting parties that addressed the service definition as it relates to broadband PCS support our proposed definition of PCS and limits on use of PCS spectrum. These parties agree with the underlying concept in this proposal that the definition of PCS should be flexible enough to provide a wide range and variety of services. Although individual parties typically have their own view as to which specific PCS services will be successful, the majority clearly envision a mobile or portable radio communications service. Bell Atlantic Personal Communications, Inc. (Bell Atlantic) states that given the rapidly changing personal communications requirements of United States consumers, all four of our PCS goals -- universality, speed of development, diversity of services and competitive delivery -- will be well-served by a flexible definition that allows for the greatest number of service offerings by diverse PCS providers. Motorola submits that the family of PCS services contemplated in the Notice is potentially revolutionary, and will significantly improve both the flexibility and functionality of existing domestic communications networks. Similarly, McCaw Cellular Communications, Inc. (McCaw) views our service definition as consistent with its fundamental goal of creating "a network of flexible, fully integrated wireless personal communications services that can be custom designed to meet each consumer's needs."[32]

21. A few parties, however, argue that our definition is too broad, vague and unfocused. For example, BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Enterprises, Inc., in joint comments, (BellSouth) state that a broad generic definition of PCS does not focus on creating new personal communications services and enhancing U.S. competitiveness. Florida Cellular RSA Limited Partnership agrees that the definition of PCS should be more specific and argues that the restrictions that PCS spectrum may not be used for broadcasting and that fixed services would be allowed only when ancillary to mobile services are not adequate to define the service. To correct this perceived deficiency, BellSouth suggests that we limit the 2 GHz PCS service to new low-power

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[30] Broadcasting is defined at Section 3(o) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(o).

[31] See First Report and Order, supra note 1.

[32] McCaw at i.

microcell services. Finally, the Alltel Companies (Alltel), while expressing support for our definition of PCS, also states that we should not limit the use of PCS spectrum by requiring that fixed services generally be allowed only as an ancillary to mobile PCS services.

22. The concepts expressed by parties developing PCS services and devices, the experimental applications we have authorized and the various requests for pioneer's preference we have received all encompass a wide range of primarily mobile services and technologies. Proposed services and devices range from advanced wireless replacements for ordinary telephones to radio communications devices capable sending and receiving voice and data to and from virtually anywhere. Specific kinds of PCS services and devices are expected to include advanced forms of cellular telephone service, advanced digital cordless telephone service, portable facsimile services, wireless PBX services, and wireless local area network (LAN) services, among others. These new services and devices can operate through the existing public switched network or through alternative local networks such as cable television systems. PCS also can exist independent of local wired networks, filling gaps in existing communications services and creating new markets. We expect that as actual PCS services and devices are developed, there will be significant further advances in technology that will expand substantially the number and types of wireless telecommunications services and devices available domestically and worldwide.

23. We conclude that the basic concept of PCS embodies primarily mobile or portable communications serving both business and individuals. In view of the above, we also continue to believe that it is important that the PCS definition provide for operation of the widest possible range of such communications. Accordingly, we find that the definition of PCS proposed in the Notice and earlier adopted for narrowband PCS services is the most appropriate approach for specifying the kinds of services that may be operated on the PCS spectrum. This definition will allow PCS providers the maximum degree of flexibility to meet the communications requirements of differing mobile and portable applications for both business and individuals. We also find that this open, flexible definition will provide the most effective approach for meeting our four objectives of universality, speed of deployment, diversity of services and competitive delivery. In prohibiting use of PCS spectrum for broadcast service and allowing fixed use of PCS spectrum only on an ancillary basis to the mobile service, we note that there is only a limited amount of spectrum available to meet the primary purpose of serving people on the move. Moreover, both broadcast and fixed services generally can be accommodated in other frequency bands or through other media.

24. We disagree with those parties that contend that our proposed definition is too broad and unfocused. Our definition of PCS limits operations to mobile or portable applications intended to serve business and individuals and suitable for integration with other networks. We believe the boundaries of this definition adequately describe the general concept of the family of services now understood to be PCS. We believe the more restrictive approaches favored by some parties would tend to have a chilling effect on innovation and creativity that would diminish rather than encourage the introduction of new PCS applications. Accordingly, for broadband PCS we are adopting a definition consistent with the definition we adopted for narrowband PCS.

> Radio communications that encompass mobile and ancillary fixed communication services that provide services to individuals and businesses and can be integrated with a variety of competing networks.

C. Spectrum Allocation for PCS

25. In the Notice, we indicated that our goal is to provide an allocation that allows for the provision of the widest range of PCS services and devices at the lowest cost to their users. In this regard, we proposed to allocate spectrum for both licensed and unlicensed PCS use from the 220 MHz allocated at 2 GHz for emerging technologies.[33] In addition, we made proposals for the number of licensed PCS providers and the amount of spectrum each provider would be assigned.

26. Many commenting parties support a substantial allocation of spectrum for PCS. These parties generally express support for our proposed allocation at 2 GHz. Parties point out that international allocations for PCS-like services are converging on the 2 GHz band. They state that a 2 GHz allocation for PCS promises international economies of scale and, therefore, the spectrum we proposed is appropriate for PCS. A number of parties submit that licensees must have access to sufficient spectrum to provide a broad range of services, to compete against cellular and other mobile service providers, and to provide effective protection to incumbent fixed microwave operations with whom PCS providers may have to share spectrum.

27. Other parties urge the Commission to allocate spectrum for PCS cautiously. They question whether all of the proposed types of PCS services will be successful. GTE Corporation (GTE),

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[33] See First Report and Order and Third Notice of Proposed Rule Making, supra note 7; and Second Report and Order and Third Report and Order and Memorandum Opinion and Order, supra note 10.

for example, while a strong proponent of new spectrum allocations for PCS, believes that a large initial allocation should not be made for PCS, as the record does not have reliable evidence on potential demand. It urges the Commission to act cautiously to ensure that spectrum resources are not irreversibly committed to services for which hypothetical demand does not materialize. Other parties, such as Ameritech, a Bell operating company, suggest that a portion of the available spectrum be reserved at this time.

28. Satellite proponents argue that some spectrum in the bands under consideration should be allocated for satellite or hybrid satellite-terrestrial PCS use. CELSAT Inc. (Celsat), for example, suggests that the 1975-1990 MHz and 2165-2180 MHz bands be allocated for hybrid use on a primary basis and the 1970-1975 MHz and 2160-2165 MHz bands on a secondary basis. It argues that this spectrum is well suited for hybrid operations as it is allocated internationally for both the mobile satellite service and the mobile service. Celsat maintains that PCS should meet communications requirements of people on the move and that the Commission should not constrain PCS to a particular transport media.

29. A number of incumbent 2 GHz fixed microwave users support allocating spectrum for emerging technologies and mobile services as a worthy goal, but express concern about the feasibility of sharing spectrum between fixed operations and PCS. Other incumbent microwave users argue that it is contrary to the public interest for the Commission to reallocate spectrum in the 1850-1990 MHz, 2110-2150 MHz, and 2160-2200 MHz bands for PCS activities. They argue that a reallocation to PCS of this spectrum whether on a shared or exclusive basis will create significant harm to existing private operational fixed operations which help ensure the safe and efficient production and delivery of the nations's vital energy resources.

30. We agree with the commenting parties that sufficient spectrum should be provided for PCS. We believe that a substantial allocation is needed to allow sharing with incumbent fixed microwave operations where necessary, and for providing PCS operators the capacity to offer a family of PCS services.[34]

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[34] We disagree with those parties, primarily incumbent 2 GHz fixed microwave users, that contend that 2 GHz spectrum is not appropriate for PCS. In ET Docket No. 92-9, we have provided a fair and equitable transition plan for the relocation of 2 GHz fixed microwave operations to higher frequencies, and we have rechannelized the higher-frequency fixed microwave bands in order to accommodate relocated 2 GHz operations. Moreover, in many cases relocation of incumbent 2 GHz fixed microwave operations may be unnecessary. We therefore believe that interests of the

Based on the record and for the reasons indicated below, we are providing additional spectrum for PCS than what we initially proposed. Specifically, we are allocating a total of 160 MHz for both licensed and unlicensed PCS services. This allocation provides 120 MHz for licensed operation and 40 MHz for unlicensed devices. We believe this amount of spectrum and this regulatory structure will support and foster the development of a wide range of competitive PCS services.

1. Licensed PCS Services

a. Allocation and Frequency Blocks

31. In the Notice, we stated that it is important that each PCS licensee be provided sufficient spectrum to be competitive with existing services such as cellular, SMRs and others. We stated that the most desirable approach would be an allocation sufficient to accommodate all interested parties. However, we recognized that lack of available spectrum necessarily would limit the number of service providers. We also noted the likelihood that PCS services will have to share spectrum with fixed microwave operations and that this would affect the capacity of the spectrum available for licensed operation. On the other hand, we observed that, unlike cellular radiotelephone systems, licensed PCS systems will not have to accommodate older and less spectrum efficient analog equipment, and therefore may be able to provide comparable service with less spectrum.

32. Taking these considerations into account, we proposed to allocate a minimum of 90 MHz of spectrum at 2 GHz for licensed PCS. Our preferred option was to assign each PCS licensee a total of 30 MHz and to make 3 licenses available in each service area. We believed this would be sufficient for the development of a number of innovative services in a competitive environment. The three licensees would be assigned frequencies in accordance with the following frequency block plan:

Frequency Block A - 1850-1865/1930-1945 MHz;
Frequency Block B - 1865-1880/1945-1960 MHz; and,
Frequency Block C - 1880-1895/1960-1975 MHz.[35]

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existing 2 GHz users have been adequately addressed.

[35] The proposed frequency block pairing is consistent with that used by most, but not all existing fixed microwave licensees. In most cases maintaining the same transmit and receive separation for PCS and fixed microwave services will simplify the relocation negotiation process because in such instances successful negotiations with a microwave licensee will clear a channel pair for the PCS operator.

33. We further proposed to allow licensees to channelize their frequency block pairs to accommodate the technologies and services that they wish to provide. This would permit the use of channel pairings, as well as allow for single frequency technologies such as one-way services or for two-way time division duplex. We also indicated that we intended to consider other options, including 20 MHz and 40 MHz frequency block assignments per licensee. We stated that if we ultimately decided to assign 20 MHz or 40 MHz blocks, the overall spectrum allocation would be adjusted accordingly, including allocation of spectrum from the other emerging technology bands.[36]

34. The parties submitting comments generally support plans that would provide for between two and five licensees per market, with frequency block sizes based generally around our proposal to allocate 90 MHz for licensed PCS services. The one exception, Pass Word, Inc. (Pass Word), suggests that to support maximum competition and in light of advancements in technology, we should license twenty service providers with a 10 MHz block each.

35. A number of commenting parties support our proposal to provide in each market three licensees each assigned 30 MHz of spectrum.[37] Some of these parties suggest that three providers would provide an appropriate level of competition. For example, Rolm argues that more than three licensees per market would dilute the PCS market, and MCI Telecommunications Corporation (MCI) suggests that more than three providers would result in each licensee having insufficient spectrum for operation in view of existing microwave operations. Celsat, a potential satellite service provider, also favors allocating 30 MHz blocks and further submits that the 1975-1990 MHz band and its companion band at 2165-2180 MHz should be reserved for hybrid terrestrial-satellite PCS use. Celsat indicates that this spectrum would, in effect, become a fourth PCS band and thereby obviate the need for

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[36] Notice, supra note 4, at para. 40.

[37] The parties supporting a 30 MHz allocation per PCS licensee include Adelphia Communications Corporation and NewChannels Corporation in joint comments; Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. in joint comments; AMSC Subsidiary Corporation; American Petroleum Institute; Calcell Wireless Inc.; the People of the State of California and the California Public Utilities Commission; Celsat; City Utilities of Springfield, Missouri; Communications Satellite Corporation; dbX Corporation (dbX); Harris Corporation-Farinon Division; Hughes Network Systems, Inc.; National Telecommunications and Information Administration; Northern Telecom; Personal Communications Network Services of New York, Inc. (PCNS-NY); Rolm; Sprint Corporation; and Teco Energy, Inc.

more than the three terrestrial PCS providers. AMSC Subsidiary Corporation (AMSC), a mobile satellite licensee, also recommends that we alter our proposed plan to preserve the primary Mobile-Satellite Service (MSS) allocations made at the 1992 World Administrative Radio Conference (WARC-92). AMSC would relocate to 2110-2125 MHz the 15 MHz proposed for PCS at 1960-1975 MHz, thereby maintaining the 1970-1990 MHz band for MSS.

36. Others such as Adelphia Communications Corporation and NewChannels Corporation, in joint comments, (Adelphia/NewChannels), the People of the State of California and the Public Utilities Commission of California (California PUC), and the National Telecommunications and Information Administration (NTIA) state that three providers is the minimum that should be licensed in each market. For example, Adelphia/NewChannels state that 30 MHz may be needed for each PCS licensee, particularly in a spectrum sharing environment. They submit that there will be a continuing need for shared use of the 2 GHz spectrum since there will be a transition period for relocation of private users in the 2 GHz band and no required relocation for public safety users. In order to accomplish the aim of licensing as many providers as possible, and to give each licensee ample spectrum, Adelphia/NewChannels suggest that our proposal to allocate 90 MHz to PCS should be enlarged to 120 MHz to accommodate four or even five licensees. NTIA recommends that we assign at least three, and if possible four or five, licensees in a given geographical area. NTIA states that it may be feasible for PCS licensees to operate viable services with less than 30 MHz.

37. APC, Cox Enterprises, Inc. (Cox), Omnipoint Communications, Inc. (Omnipoint), and several others support a policy of two PCS licenses per market with at least 40 MHz each.[38] These parties submit that two licensees per market would be the most efficient and economically desirable solution, given the presence of the existing fixed microwave operations in the 2 GHz band. APC believes that two providers will produce a robustly competitive marketplace and lower cellular rates. Cox argues that "the heavy concentration" of microwave licensees exempt from relocation must be taken into account when determining adequate spectrum assignments. Omnipoint argues that initially authorizing only two licensees per service area would reducing the cost of service to the consumer because systems

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[38] APC, Cox, and Omnipoint were tentatively awarded pioneer's preferences for 2 GHz PCS service in the Tentative Decision and Memorandum and Order, supra note 6. Other parties supporting two licensees per market include Associated PCN Company; Comsearch; InterDigital Communications Corp.; MCI; PerTel, Inc.; PCN America; PCN Communications, Inc.; Qualcomm Incorporated; and Time Warner Telecommunications.

could obtain higher capacity at a lower infrastructure cost than would be possible if more licensees are initially authorized per service area. PerTel, Inc. suggests that two providers per market would conform more readily to existing channeling plans, and accommodate the broadest range of transmission schemes while still being economically feasible.

38. APC, Associated PCN Company (Associated PCN), Comsearch and Time Warner Telecommunications (Time Warner) argue that enough spectrum is needed to ensure that PCS services are competitive with other land mobile services and can offer a full range of personal communications services. They state that 40 MHz is needed due to the lengthy transition period for relocation of microwave users in the 2 GHz band and the exemption from mandatory relocation for public safety users. APC argues that effective parity with cellular requires that PCS licensees be provided 40 MHz. It states that PCS is expected to serve at least four times as many subscribers with its spectrum than cellular, with lower expected costs for consumers. APC indicates that its recommendation is based on an exhaustive comparative examination of spectrum availability in each of the largest 11 cities in the United States for 20, 30 and 40 MHz per licensee. Associated PCN agrees, stating that its studies demonstrate that 40 MHz should be allocated to each PCS licensee in order to provide sufficient spectrum for prompt initiation of PCS services and achieve effective spectrum parity for PCS and cellular. Associated PCN argues that there will be a continuing need for shared use, and therefore more spectrum will be needed by PCS licensees than if the spectrum were "clean." It notes that in markets like Los Angeles with a high number of microwave users that are exempt, 40 MHz is needed to develop PCS.[39]

39. There is substantial support for a plan that would provide either four or five licensees, with 20 MHz or 25 MHz per licensee.[40] The parties supporting this approach submit that

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[39] Associated PCN notes that in the Los Angeles area, there are approximately 75 paths operated by governmental users that are exempt from involuntary relocation.

[40] This group included the following commenters: Advanced Cordless Technologies, Alltel, American Mobile Telecommunications Association, Inc., API, AT&T, BellSouth, Cellular Telecommunications Industry Association, Chesnee Telephone Company, Cincinnati Bell Telephone Company, Comcast, GTE, Lincoln Telephone and Telegraph Company, McCaw, National Telephone Cooperative Association, NYNEX Corporation (NYNEX), Pennsylvania Public Utility Commission, Piedmont Rural Telephone Cooperative, Inc., Rochester Telephone Corporation (Rochester), West Carolina Rural Telephone Cooperative, Inc., Farmers Telephone Cooperative, Lancaster Telephone Company, Roseville Telephone Company, South

we should provide for as many competitors as possible and that 20 MHz of spectrum is sufficient for initiation of viable PCS services. For example, Rochester Telephone Corporation (Rochester) believes that maximizing the number of licensees would result in the availability of a wide variety of services and features to the public and ensure that prices are reasonable. The American Petroleum Institute (API) argues that 20 MHz would be an adequate amount of spectrum to support PCS operations and would minimize the impact on existing microwave operations. According to API, use of 10 MHz blocks by PCS systems for transmitting and receiving would necessitate that a PCS operator negotiate with only a single microwave operator for access to its full band of frequencies. API states that this would enable PCS operators to rapidly deploy systems even in areas where the spectrum is crowded with existing licensees. It argues that this would not be the case if we were to allocate 30 MHz blocks to PCS, because PCS operators would likely have to negotiate with two or more microwave licensees to provide 15 MHz on either side of a paired configuration.

40. American Telephone and Telegraph Company (AT&T), BellSouth and GTE similarly state that 20 MHz would provide PCS licensees with spectrum capacity comparable to cellular and other mobile service operators. These parties agree with our observation in the Notice that PCS systems likely will be able to operate with less spectrum than that assigned cellular operators because PCS systems will not have to accommodate existing analog equipment. They state that PCS systems are expected to be able to support a greater volume of communications through use of spectrum efficient techniques such as CDMA and TDMA. BellSouth submits that 20 MHz will provide sufficient capacity for a very large number of PCS users due to the intensive frequency reuse possible with low-powered microcell deployment.

41. Ameritech, Cincinnati Bell, Comcast, Tandy and U S West, Inc. (U S West), propose that we license four 20 MHz PCS providers per market, which would necessitate that a total of 80 MHz be allocated for licensed services. The general positions of these parties, as expressed by Comcast, is that four providers would maximize competition, promote efficiency and innovation, enhance diversity and be technically sufficient for the future. U S West also states that it has conducted an analysis of cost, traffic loads, and total market demand that suggests that four licensees per market, each with 25 MHz, is appropriate.

Carolina Telephone Association, Southern New England Telecommunication Corporation, Telephone and Data Systems, Inc., United States Telephone Association (USTA), and Vanguard Cellular Systems, Inc.

42. Many parties representing existing mobile service providers and local telephone companies recommend five licensees with each licensee assigned about 20 MHz.[41] These parties generally argue that due to the low power microcell architecture of PCS, 20 MHz will provide substantial capacity and will support a very large number of users and that allotting each PCS provider a larger block of spectrum would be spectrally inefficient. NYNEX Corporation (NYNEX), McCaw and Centel Corporation (Centel), for example, submit that a five licensee plan is needed to encourage competition and diversity in PCS services. AT&T suggests that 20 MHz should provide an amount of spectrum that approximates that already allocated to other mobile service providers. Telmarc Telecommunications, Inc. further proposes that we initially issue only three of the five licenses available in an area, reserving the remaining two licenses until the market demonstrates that it could support additional PCS providers.

43. Bell Atlantic suggests that five licensees with from 18 to 20 MHz each would be appropriate. In an accompanying study by Dr. Charles Jackson, Bell Atlantic submits that dividing 90 MHz among five licensees rather than the three proposed in the Notice would result in an efficiency loss of only 2.1 percent but would increase competition significantly. Bell Atlantic also suggests that we consider allocating additional spectrum for PCS and that we consider allocating most PCS spectrum in contiguous blocks.[42] They indicate that contiguous bands will enhance future flexibility, support internal sub-bands and asymmetrical operations and improve multipath performance.

44. In addition, a number of the parties suggest that we apply certain restrictions on use of frequency blocks or that we adopt plans other than those discussed above. Chesnee Telephone Company, Home Telephone Company and the National Telephone Cooperative Association argue that one of the five licenses in each area should be set aside for public switched telephone (PSTN) use. BellSouth proposes that we provide 20 MHz for local loop applications such as using a radio link to connect customers to the wireline plant. It recommends that 10 MHz of this spectrum be held in reserve to meet future needs. The Utilities Telecommunications Council (UTC) states between 90 and 120 MHz of

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[41] Parties supporting five PCS licensees per market include AT&T, BellSouth, Centel Corporation, the Cellular Telecommunications Industry Association (CTIA), McCaw, GTE, the National Telephone Cooperative Association, NYNEX, Telmarc Telecommunications, Inc., USTA, and a number of local telephone companies filing individual comments.

[42] Bell Atlantic suggests dividing the entire 1850-1990 MHz band into four contiguous 24 MHz bands, two 12 MHz paired channel bands and 10 MHz for unlicensed operations.

spectrum should be allocated for licensed PCS use and that 20 MHz of this spectrum should be reserved for PCS traditional private radio service users. Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc., in joint comments, (AMT/DSST) suggest that one of the 30 MHz PCS licenses in each market be designated for a PCS "Open Network Architecture" (ONA) system. Under this approach, the ONA licensee would operate a 5 MHz PCS system and would provide facilities and interconnection on the remainder of the spectrum for the provision of PCS services by non-licensed providers. A similar approach for sharing spectrum among licensed PCS providers was submitted by Corporate Technology Partners (CTP).

45. The Ericsson Corporation (Ericsson) supports allocating 90 MHz, as proposed in the Notice. However, it recommends that we adopt a plan that provides two licenses with 25 MHz each and a reserve of 40 MHz. Ericsson submits that 25 MHz is appropriate for initial PCS operation because that is the amount of spectrum assigned to existing cellular operations. It further states that the reserve would be appropriate to allow for future expansion of licensed services and to ensure that there is adequate spectrum to support viable unlicensed services. Viacom submits that two PCS licensees per market would be optimal and that in no event would more than three be desirable. It proposes providing an equivalent of 50 MHz for each licensee by permitting sharing across the entire 1850-1990 MHz band. Pacific Telesis Group (PacTel) suggests three licensed providers with a minimum of 25 MHz each and 65 MHz for unlicensed PCS operations.

46. Several of the commenters state that 10 MHz of spectrum would be sufficient to provide viable competitive PCS service. Pass Word argues that CDMA and other technology permit operating high-capacity systems with allocations of 5 MHz or less.[43] It states that with such technologies a 5 MHz allocation could provide twice the capacity of current analog cellular systems. Pass Word therefore proposes that we provide twenty licensees per area, each with 10 MHz, licensed on an Metropolitan Statistical Area (MSA) basis. Pass Word suggests twelve licensees in the 1850-1990 MHz band and eight additional licensees in the 2110-2200 MHz band. It argues that such a regulatory framework will create a truly competitive market and would be more beneficial than having larger allocations with fewer competitors and would provide a competitive market for local exchange service.

47. PDM/PCS also supports smaller allocations with more providers in each service area. It states that each PCS system would require only 10 MHz of spectrum if the licensees had the opportunity to integrate their systems with the LEC's landline system. City Utilities of Springfield, Missouri states that a 10

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[43] Pass Word at 2-3.

MHz PCS system could provide a wide array of services including data, telemetry and voice communications. It states that such an allocation would provide sufficient capacity for both utility-related use and a viable PCS service. Similarly, Advanced Cordless Technologies, Inc. (Advanced Cordless) supports allocation of 10 MHz to the LEC (or LECs) in their authorized service area.

48. Motorola, while supporting two licensees with 40 MHz, also suggests that we provide two additional unpaired 10 MHz frequency blocks for multiple licensees. Motorola states that these additional 10 MHz blocks would provide increased opportunity for small entrepreneurs to enter the PCS market and permit expansion of the spectrum proposed for unlicensed PCS. PowerSpectrum, Inc. recommends a channel plan that would provide between 10 and 20 MHz for each PCS licensee with a minimum of five licensees. Fleet Call, Inc. (Fleet Call) supports granting four PCS licenses with 15 MHz each and a fifth license with 30 MHz.[44] Additionally, Fleet Call states that an assignment of 15 MHz per licensee would provide each licensee with more capacity than today's analog cellular systems. Fleet Call notes that new Time Division Multiple Access technology can provide six times the spectrum efficiency of existing the analog cellular technology. Fleet Call also observes that some of the digital technologies being tested by PCS experimental licensees claim even more spectrum capacity.[45]

49. CTIA suggests that we authorize five licenses each with 20 MHz of spectrum and that we also set aside an additional 10 MHz as a special reserve to be licensed in the future as additional requirements are demonstrated.[46] Alltel proposes five licensees of 20 MHz each, with 5 MHz held in reserve for each license.[47] Century Cellunet, Inc. proposes three licensees each with 20 MHz allocation and a 5 MHz reserve.[48]

50. AMT/DSST state that the PCS marketplace will be characterized by PCS systems "of all shapes and sizes" and by a continually evolving set of service options and system technologies. They argue that opportunity for multiple providers

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[44] Fleet Call at 9. Fleet Call subsequently changed its proposal to five licensees per area, each with 20 MHz. See Fleet Call Reply at 12.

[45] Fleet Call at 9.

[46] CTIA at 28.

[47] Alltel at i.

[48] Century Cellunet, Inc. at 9.

of PCS services should be provided by adopting its PCS-Open Network Architecture (P-ONA) system, which they state would provide multiple providers with 5 MHz or less to provide PCS services. AMT/DSST suggest that at least one license per market be designated as the P-ONA licensee and that this party receive a license conditioned upon its satisfaction of ONA and Expanded Interconnection (EI) obligations. Under AMT/DSST's plan a P-ONA licensee would have 30 MHz of spectrum. The P-ONA licensee would be required to initially construct and operate a 5 MHz system itself and provide access to other providers in the rest of the 30 MHz spectrum block. The P-ONA licensee could obtain additional bandwidth only as warranted by system congestion and spectrum availability.[49]

51. NTIA recommends that we allocate 100-120 MHz of spectrum for licensed PCS. It states that in addition to providing frequency blocks of 30 MHz, we should also provide additional smaller frequency blocks of 10-15 MHz each.[50] NTIA states that "relatively small" spectrum blocks offer several benefits. First, small blocks would allow more licensees per service area, permitting a large number of PCS providers to compete in the marketplace. NTIA next observes that these relatively small frequency blocks could be less expensive to obtain through competitive bidding, making it easier for some parties, such as small, innovative enterprises and rural telephone companies, to participate in the initial bidding. NTIA also states that the assignment of relatively small spectrum blocks would recognize that technology is becoming more spectrum efficient. It concludes that a bifurcated approach of "large" licensees with 30 MHz and "small" licensees of 10 or 15 MHz would promote efficiency in use of the spectrum resource, increase the number of potential PCS competitors, and create blocks that are more affordable to small businesses.

52. NTIA also argues that a bifurcated assignment scheme not only would increase the potential for additional new PCS licensees, but also would allow existing cellular providers to compete for and provide PCS services without engaging in anticompetitive practices. Specifically, NTIA states that an incumbent cellular provider should be permitted to compete for one of the 10 or 15 MHz licenses in its current service area. It states that such a licensing arrangement would permit issuing at least five PCS licenses in each service area and that this would minimize the risk of anticompetitive behavior. NTIA argues that

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[49] AMT/DSST at 11.

[50] See letter to the Honorable James H. Quello, Acting Chairman, Federal Communications Commission from Larry Irving, Assistant Secretary for Communications and Information, United States Department of Commerce, dated September 14, 1993.

this new spectrum could complement the 25 MHz that current cellular licensees already hold in their respective service areas, allow cellular operators to provide more advanced services than at present, and maintain a competitive balance between existing cellular operators and new PCS providers.

53. The commenting parties suggest a wide variety of possible approaches for the number of PCS licensees in each area and the amount of spectrum that should be provided for their use. In analyzing these matters and reaching conclusions we must balance a number of factors: 1) the need to provide individual licensees with sufficient spectrum to develop viable PCS services; 2) the fact that in some cases PCS operators will be required to share spectrum with incumbent fixed microwave operations; 3) the need to authorize a sufficient number of licensees to ensure a competitive environment; 4) the need to provide spectrum for unlicensed PCS operations; 5) the potential for development of satellite or hybrid satellite-terrestrial PCS services; and, 6) the need to conserve the limited amount of spectrum that is available for new uses.

54. After careful examination of the record pertaining to these issues, and consistent with our suggestion in the Notice that this might be required, we concur that the public interest would be furthered by providing more spectrum than that which we proposed for the implementation of licensed PCS services. We are therefore adopting an allocation plan that provides a total of 120 MHz for licensed PCS. This 120 MHz allocation will dedicate a substantial amount of spectrum for new mobile services and technologies and is more than twice the spectrum now provided for cellular radio services.

55. We also note that the commenting parties and the PCS experiments suggest a wide range of PCS services and concepts that are likely to have differing spectrum requirements. For example, some parties have suggested voice and data services that can operate in relatively narrow bandwidths, while others are proposing more ambitious data and video services that will need considerably more spectrum. Accommodating this wide range of services and technologies with different spectrum requirements requires an allotment plan with frequency blocks of varying sizes, as suggested by NTIA. Further, consistent with the requirements of the Budget Reconciliation Act,[51] this plan, in conjunction with our implementation of competitive bidding, will facilitate entry to PCS markets by small businesses, minority and women owned businesses, and rural telephone companies.

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[51] See note 17, supra.

56. To accommodate this range of alternative PCS spectrum requirements efficiently, we will license the 120 MHz of PCS spectrum as four 10 MHz blocks, one 20 MHz block, and two 30 MHz blocks. These blocks will occupy the PCS spectrum in accordance with the following plan:

Frequency Block A - 1850-1865/1930-1945 MHz;
Frequency Block B - 1865-1880/1945-1960 MHz;
Frequency Block C - 1880-1890/1960-1970 MHz;
Frequency Block D - 2130-2135/2180-2185 MHz;
Frequency Block E - 2135-2140/2185-2190 MHz;
Frequency Block F - 2140-2145/2190-2195 MHz; and,
Frequency Block G - 2145-2150/2195-2200 MHz.[52]

57. We note that many of the commenting parties indicate that 10 to 20 MHz would provide adequate spectrum for many types of PCS service, including cellular-like operations. These parties point out that PCS systems will use a microcellular architecture that provides efficiencies through significant frequency reuse. In addition, they state that PCS will employ digital modulation techniques more advanced and efficient than those currently used by services such as cellular and SMR. Qualcomm Incorporated (Qualcomm) claims, for example, that with 1.25 MHz of spectrum its CDMA technology provides the same capacity as an analog cellular system using 25 MHz.[53] Similarly, Fleet Call states that its digital speech coding and TDMA transmission techniques provide six voice channels in the same amount of spectrum that supports a single analog cellular voice channel (25 kHz). Fleet Call states that it is implementing enhanced SMR systems on less than 14 MHz of spectrum that have substantially more capacity than analog cellular systems using 25 MHz.[54] In the same vein, AMT/DSST state that their system achieves six to ten times the capacity of other systems, including three to six times the capacity of the Digital

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[52] In developing this channelization plan, we have maintained the predominant channel separation used by existing fixed microwave operations. In the 1850-1990 MHz band, this separation is 80 MHz; in the 2100-2200 MHz band the channel separation is 50 MHz. We believe that this approach will facilitate coordination between PCS and fixed microwave services and eventual relocation of fixed microwave operations as provided in ET Docket No. 92-9, see note 10 supra.

[53] See Qualcomm, Request for Pioneer's Preference, Appendix A at 6.

[54] See Fleet Call Pioneer's Preference Reply at 6 (March 1, 1993).

European Cordless Telecommunications (DECT) standard.[55] We conclude that a 10 MHz allocation can support viable and competitive PCS services through the use of digital methods such as CDMA and TDMA and microcellular technology.[56]

58. Although 10 MHz is sufficient for viable operation of many forms of PCS services, we also believe that some types of PCS operations will require more than 10 MHz to provide services that require wider bandwidths. We therefore conclude that allocating additional spectrum in 30 and 20 MHz frequency blocks is appropriate and will facilitate the rapid development and implementation of the fullest range of services. An additional factor emphasized by the parties and which we recognize is that PCS initially will be required to operate on a shared basis with fixed microwave operations, and therefore the full amount of spectrum provided to a licensee may not be available at every location within its service area. We note, however, that there is a different fixed microwave environment in the bands below 2 GHz where the 30 MHz and 20 MHz frequency blocks are located and the bands above 2 GHz where the 10 MHz frequency blocks are located. In the bands below 2 GHz the fixed microwave operations use bandwidths of 5 MHz and 10 MHz, with most operations using 10 MHz. Therefore, it will be difficult for PCS licensees in the spectrum below 2 GHz to share with incumbent fixed microwave operations unless PCS licensees are assigned at least a 20 MHz frequency block.[57] On the other hand, in the spectrum above 2 GHz the fixed microwave operations use either 0.8 MHz or 1.6 MHz channels, with the majority using 0.8 MHz channels. While there are a greater number of fixed microwave operations in these bands, the narrow bandwidths used provide greater opportunity for PCS licensees to share spectrum and implement viable PCS services

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[55] See AMT/DSST Pioneer's Preference Comment at 28 and Exhibit 4 at 2 (January 29, 1993).

[56] We note that Canada has allocated only 4 MHz for PCS services at 900 MHz and is holding an additional 4 MHz allocation in reserve.

[57] APC submitted a spectrum availability study addressing the 1850-1990 MHz band indicating that under a five licensee and 20 MHz allocation scheme there would be, on average, about 13 MHz available per licensee without microwave relocation. Our analysis of the APC data for the composite city shows that under this scheme at least three licensees would have at least 10 MHz available for about 80 percent of locations, and that at least two licensees would have the full 20 MHz available for about 70 percent of locations.

with frequency block assignments of 10 MHz.[58] Considering the impact of the incumbent fixed microwave operations, we believe the multiple frequency block scheme we are adopting will best provide for implementing a wide variety of services within the PCS family.

59. As a final matter, this approach also is consistent with our proposal for using competitive bidding procedures to select PCS licensees.[59] If competitive bidding procedures are adopted for PCS, applicants will be able to bid for only that amount of spectrum needed to provide the intended service. They will not be handicapped by being required to pay for spectrum in excess of that required to provide the service they intend to offer. This flexibility to match an applicant's specific needs with spectrum should promote efficient use of the spectrum resource.

60. We believe that the approach we are adopting will foster a wider diversity of PCS service offerings; will permit broader participation in the provision of PCS, including participation by existing cellular providers;[60] and will allow us to consider special opportunities to promote the participation in PCS of small businesses, rural telephone companies and businesses owned by minorities and women.[61] Further, we

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[58] APC submitted a spectrum availability study addressing the paired bands 2130-2150/2180-2200 MHz indicating that an allocation scheme providing for four licensees, each with a 10 MHz frequency block, would result in an average of 7.7 MHz being initially available per licensee before relocation of any microwave operations.

[59] See note 21, supra.

[60] As indicated below, cellular entities will be eligible for licensing on one of PCS frequency blocks E, F, and G within their cellular service area. Consistent with our policy to limit aggregation of spectrum to 40 MHz, and because cellular licensees currently have 25 MHz, cellular entities may hold only the license for one 10 MHz PCS frequency block within their service area.

[61] The FCC Small Business Advisory Committee (SBAC) assessed the policy implications of the PCS proceeding. Its report, dated September 15, 1993, concludes that small frequency blocks with multiple licensees in each service area and a frequency block designated for qualified small, female owned, and minority owned businesses would assist entrepreneurial entry in PCS. The SBAC also suggested that the Commission consider other mechanisms to foster entry opportunities and capital formation for such groups. A copy of the SBAC report was placed in the

believe that this approach strikes an appropriate balance of providing sufficient spectrum for licensed PCS and providing additional flexibility for PCS operators to coordinate with existing microwave licensees. In addition, our decision to provide for between three and seven PCS licensees in each area will ensure that there is a robust and competitive market for PCS services.

61. We also will permit most licensees to aggregate spectrum up to a total of 40 MHz in any geographic area. In determining whether an entity complies with our aggregation limit, all PCS ownership interests of 5 percent or more will be attributed to the holder of such interest.[62] Conversely, interests of less than 5 percent will not be considered in determining whether an individual or entity complies with the local aggregation limit. This provision will ensure that no individual person or a single entity is able to exert undue market power through partial ownership in multiple PCS licensees in a single service area.

62. We realize that licensees in the lower band, the 30 MHz and 20 MHz licensees, will be required to aggregate with the 10 MHz frequency blocks of the higher band if their systems require more than 30 or 20 MHz. While this potentially could require complex and therefore more expensive equipment capable of operating in both bands, we believe that this plan reasonably accommodates licensees requiring more than 30 or 20 MHz to provide the full range of services they envision. Further, the flexibility to acquire frequency blocks will allow licensees that wish to provide different packages of services in the different frequency blocks additional market opportunities that will not necessarily require a single piece of equipment capable of operating in both bands. Finally, we believe that limiting

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record and is attached as Appendix C. As required under the Budget Reconciliation Act, we are initiating a separate rule making on the licensing of PCS through the use of competitive bidding. As part of that rule making, we consider whether special conditions should apply to a one or more of the above frequency blocks, including a possible reservation, or set aside, to promote the participation in PCS of small businesses, rural telephone companies and businesses owned by minorities and women; and propose to set aside frequency blocks C and D for these preferred groups. See note 21, supra.

[62] For example, an entity could not have an ownership interest of 5 percent or more in PCS licensees that combined are licensed more than 40 MHz in a single service area, but could have up to full ownership interest in one licensee with 40 MHz and at the same time hold an interest of less than 5 percent in other PCS licensees in the same service area.

entities to a maximum of 40 MHz, which ensures that there will be at least three providers in each service area, strikes an appropriate balance between providing maximum market opportunity for each licensee and ensuring that no one person or entity is able to exert undue market power through aggregation of spectrum.

63. We also concur with those parties that suggest some spectrum should be considered for satellite PCS use. Therefore, in order to preserve our options with regard to satellite-based services, at the same time we decline to allocate to PCS the 1970-1990 MHz and the associated 2160-2180 MHz bands that were designated for MSS at WARC-92.[63]

b. Service Areas

64. In the Notice we requested comment on four options for the size of the service area to be licensed for PCS. The four options are: 1) the 487 "Basic Trading Areas" (BTAs) defined in the Rand McNally Commercial Atlas and Marketing Guide,[64] plus Puerto Rico; 2) the 194 telephone Local Access and Transport Areas (LATAs); 3) the 47 "Major Trading Areas" defined in the Rand McNally Commercial Atlas and Marketing Guide, plus Alaska and Puerto Rico; and 4) nationwide. Consistent with our proposal to grant at least three PCS licenses per service area, we also presented the possibility of licensing different spectrum blocks using different size service areas.[65] A final possibility we noted would be to determine service areas through a competitive bidding process, if we were provided such authority by Congress.

65. There was no general consensus in the comments on the appropriate size of licensed PCS service areas. A number of the commenting parties express a preference for one of the four options we indicated in the Notice. Many others, however, suggest additional options, such as using the MSA/RSAs that define the cellular radio service markets, or variations of our four options.

66. Several parties support using BTAs as the basis for PCS service areas. Ameritech, for example, states that BTAs will provide the greatest opportunity for participation in PCS, while minimizing start-up costs when compared to larger service areas.

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[63] See Celsat, Petition for Rule Making, RM-7927 (filed February 6, 1992); and Amendment To Petition For Rule Making (filed July 8, 1993).

[64] Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition.

[65] Notice, supra note 4.

PacTel also supports use of BTAs and notes that larger service areas, such as the 47 MTAs, likely would result in licensees structuring their service in those areas into metropolitan hubs that would closely correspond to BTAs. PacTel also submits that larger service areas would result in licensees not providing service to less populous areas. PacTel therefore concludes that smaller service areas will result in more rapidly deployed, ubiquitous PCS coverage.

67. Other parties support using MTA-based service areas. APC argues that MTAs should be used to define service areas because MTAs are defined by commerce, would result in fewer licensing decisions and would promote roaming. APC further claims that MTAs are similar to the consolidated regions now served by cellular operators. Cox and UTC also support MTAs, stating that MTAs are as the best compromise for facilitating speed of deployment and avoiding future consolidation costs.

68. Several parties support using LATAs. AT&T maintains that using LATA-defined service areas would promote diversity of licensees without fragmenting the license process. Cablevision Systems Corporation maintains that LATAs strike an appropriate balance between the need to avoid the severe fragmentation that would result from using MSA/RSAs or BTAs, and the high level of consolidation that would result if MTAs are used. CTP also supports using LATAs to define PCS service areas. CTP predicts that PCS will be an extension of services provided by local exchange carriers (LECs), and therefore that LATAs are the most appropriate for defining service areas. Comcast argues that LATAs would promote diversity, innovation and would provide the economies of scale needed to compete with LECs.

69. Celsat, MCI, PCN America, Inc. (PCN America) and InterDigital Communications Corporation (InterDigital) support nationwide PCS service areas. Celsat, which has proposed a hybrid satellite-based service, states that a nationwide service area is the only economically feasible choice. MCI maintains that national service area licenses should be awarded to consortia consisting of one "major" participant and a group of local independent operators. MCI argues that such an approach would provide economies of scale and also allow broad participation by local operators. It argues that such an approach would allow each consortium to set national standards for PCS, ensuring that regional incompatibilities do not arise. InterDigital also supports a consortium approach that would result in three separate consortia or partnerships being licensed nationwide.

70. The majority of the commenting parties support using MSA/RSAs for defining PCS service areas. Most of these parties are either cellular or telephone carriers. For example, CTIA argues that MSA/RSAs would promote speed of deployment, universal

service and competitive delivery. CTIA also maintains that consumers would benefit from economies of scale and scope from matched PCS-cellular service areas. Cellular Communications, Inc. states that if the Commission limits in-service area participation of cellular carriers, the service area should be defined as MSA/RSAs. Sprint Corporation (Sprint) adds that MSA/RSAs would limit the transaction costs of subdividing markets. Other parties, for example, Cincinnati Bell Telephone, maintain that using familiar MSA/RSA service area definitions will eliminate confusion among PCS participants. The United States Telephone Association states that MSA/RSA based service areas will permit a greater number of service providers, enhanced service and product innovation, and will broaden the availability of PCS. Finally, the United States Small Business Administration expresses support for MSA/RSAs in the interest of promoting small business and argues that in any event service areas smaller than national or regional should be adopted for these reasons.

71. The remaining parties addressing PCS service areas express their support for a combination of various size service areas, Commerce Department Economic Areas, or self-defined areas. Bell Atlantic and Time Warner support a combination of national and regional service areas. Bell Atlantic maintains that a nationwide service area would offer greater efficiencies, promote investment and result in a uniform roll-out of interoperable services. It argues that a large national customer base will make marginal services viable. Further, Bell Atlantic contends that when used in conjunction with a regional or local licensing scheme, its plan promotes diversity and localism. Time Warner states that a scheme using one nationwide service area and 49 (MTA-based) regional licenses would promote roaming, economies of scale and expeditious licensing. PCN America argues for a three-tiered scheme consisting of two national network operators, two regional licensees in each of the 49 MTAs and multiple additional local licensees in each of the MTAs.[66]

72. NTIA suggests that we use the 183 "economic areas" defined by the Department of Commerce's Bureau of Economic Analysis (BEA) for PCS service areas. It notes that a BEA area generally consists of an MSA and surrounding areas related by

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[66] Under PCN America's plan PCS services would be provided to users by the regional and local licensees. The national network operators would provide certain functions and technical services such billing, roaming, interconnection and technical standards to support the regional and local licenses. Further, the regional licensees would be required to relinquish at least 30 percent of the land area of their MTA and a minimum of 25 percent of their population for licensing to at least 25 local licensees.

commuting patterns.[67] NTIA further states that we should allow PCS licensees to aggregate and subdivide their service areas freely in response to market forces. It states that this freedom to alter their service areas over time is more important than the initial PCS service area size. Advanced Cordless argues for licensees defining their own service areas. ACT contends that service providers should serve areas they deem economically appropriate.

73. We conclude that a combination of MTA and BTA service areas would promote the rapid deployment and ubiquitous coverage of PCS and a variety of services and providers. We recognize that the majority of parties express support for MSA/RSAs as the definition of PCS service areas. We conclude, however, that using MSAs/RSAs likely would result in unnecessary fragmentation of natural markets. MTAs and BTAs were designed by Rand McNally based on the natural flow of commerce. Specifically, the trading area "boundaries have been drawn on a county-line basis because most statistics relevant to marketing are published in terms of whole counties. The boundaries have been determined after an intensive study of such factors as physiography, population distribution, newspaper circulation, economic activities, highway facilities, railroad service, suburban transportation, and field reports of experienced analysts."[68]

74. Further, as stated in the Notice, there has been a great amount of consolidation of the MSA/RSA markets in the cellular service, which may have been driven by the greater economies of scale and scope in larger cellular operations. This consolidation has resulted in unproductive regulatory and transaction costs in the assignment process for cellular.[69] We believe that larger PCS service areas, such as MTAs and BTAs, will minimize these problems. In addition, large PCS service areas also may facilitate regional and nationwide roaming; allow licensees to tailor their systems to the natural geographic dimensions of PCS markets; reduce the cost of interference coordination between PCS licensees; and simplify the coordination of technical standards. Further, BTAs and MTAs offer large service areas and therefore are complementary with and will facilitate the coordination and negotiation processes associated with the microwave relocation activities that will be necessary in many cases.

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[67] NTIA at 11-20 (November 9, 1992).

[68] See Rand McNally 1992 Commercial Atlas & Marketing Guide at 39.

[69] In addition, there would be considerable administrative costs and delay as a large number of applications are initially processed, then later merged.

75. In addition, we believe a combination of both MTA and BTA service areas would maximize the benefits of having both large and small service areas. The BTA area is representative of likely PCS markets in which local communications will take place. BTA service areas also offer important benefits in that they permit broad participation in the PCS market by firms of all sizes. For example, some potential PCS licensees may be interested in serving only their local areas, including smaller communities that are less economic to serve. By permitting broader participation, smaller service areas may produce a greater degree of technical and service innovation than would be expected from a few large firms. Such diversity may be an important benefit during the initial period of PCS implementation when the market and services are still being defined. We expect that MTAs will provide the economies of scale and scope necessary to promote development of low cost PCS equipment. We also believe that MTAs will result in operation of regional systems that will promote roaming within large geographic areas and may facilitate interoperability with other PCS systems.

76. We therefore will license PCS systems to serve both BTA and MTA areas. As indicated above, we are establishing four 10 MHz frequency blocks (5 MHz paired), one 20 MHz frequency block (10 MHz paired), and two 30 MHz frequency blocks (15 MHz paired). The spectrum will be divided evenly between BTA and MTA service areas, 60 MHz for each. The two 30 MHz frequency blocks will be designated for MTA operation. We believe that providing these frequency blocks on an MTA basis will provide the economies of scale and scope necessary for the development of low cost PCS equipment. Licensing the largest frequency blocks to the largest areas also is expected to result in roaming and interoperability within these regions for the wide range of services permitted by the wider allocation.

77. The remaining one 20 MHz frequency block and four 10 MHz frequency blocks will be designated for BTA operation. We believe that these smaller service areas are large enough to support viable services that will be competitive with those to be provided on a MTA basis and will also allow for efficient roaming and interoperability with other PCS systems. Further, the combination of these frequency blocks and BTA service areas will minimize the start-up cost likely to result from competitive bidding, and therefore provide greater opportunity for participation in a variety of PCS by small businesses, female and minority entrepreneurs, rural telephone companies, and others. Providing these frequency blocks with BTA service areas also will stimulate a more rapid deployment of PCS in less populated areas, promoting a more ubiquitous PCS coverage. Finally, this mix of MTA and BTA service areas and 30 MHz, 20 MHz, and 10 MHz frequency blocks will promote a variety of both complementary and competing PCS services.

78. Consistent with the eligibility requirements discussed below, we will permit licensees to aggregate service areas.[70] In addition, if we adopt our proposal in our companion Notice that proposes competitive bidding rules to govern our grant of PCS licenses, larger service areas, possibly including nationwide, will be available directly through that process.[71] This approach ensures that PCS will have the potential to compete with existing mobile radio services such as cellular and special mobile radio service operations and that there is sufficient competition among PCS providers at both the local and regional levels.

2. Unlicensed PCS Devices

79. In the Notice we tentatively concluded that an allocation for unlicensed PCS would be in the public interest and proposed to allocate 20 MHz for such use. The kinds of unlicensed applications that would be permissible under this allocation would include, but not be limited to, high and low speed data links between computing devices, cordless telephones and wireless PBXs. We indicated that this unlicensed approach could be expected to foster the rapid introduction of new PCS technologies by permitting manufacturers to introduce new products without the delays associated with the licensing of a radio service. We observed that unlicensed operation will need relatively clear spectrum and that 1910-1930 MHz currently is relatively lightly loaded. Accordingly, we proposed to designate the 1910-1930 MHz band for use by unlicensed devices on a co-primary basis with existing fixed microwave operations, on the condition that unlicensed PCS devices not cause interference to existing microwave stations or new microwave stations for which applications were on file as of July 16, 1992. We also requested comments on the feasibility of unlicensed PCS users and equipment manufacturers negotiating relocation agreements with incumbent microwave licensees.

80. With the exception of some existing fixed microwave users, the commenting parties generally support allocation of spectrum for unlicensed PCS operation. These parties indicate that unlicensed PCS will provide for the introduction of many new services and devices to meet a wide range of wireless voice and data communications needs. These parties further indicate that the ability to operate on an unlicensed basis will enable

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[70] As indicated above, PCS licensees also may aggregate licenses for up to 40 MHz of spectrum within any service area.

[71] In that Notice, we proposed to allow larger PCS service areas if the competitive bidding process demonstrates a larger service area would be a higher valued use. See note 21, supra.

products and services to be introduced more rapidly than is possible on a licensed basis. Some of the unlicensed PCS applications envisioned by these parties include wireless LANs, advanced cordless telephones and new data communications systems and devices for linking personal computers.

81. Many commenting parties, however, maintain that the proposed 20 MHz allocation for unlicensed services is not sufficient to accommodate the projected demand for unlicensed PCS services. Apple Computer, Inc. (Apple), Hewlett-Packard Company, InterDigital, and the IEEE Project 802 Local and Metropolitan Network Standards Committee (IEEE Project 802)[72] advocate larger initial allocations of 35 to 70 MHz. Pulse Engineering Inc. estimates unlicensed PCS spectrum requirements at 90 MHz. AT&T estimates the requirements of unlicensed devices at 40 MHz for high-speed data and 25 MHz for voice and low-speed data. North American Telecommunications Association (NATA) maintains that data systems will require at least 40 MHz, and voice systems 40 to 50 MHz. Wireless Information Networks Forum (WINForum) estimates unlicensed spectrum requirements of 20 MHz for wireless PBX, 20 MHz for data, and 5 MHz for cordless telephones.[73] PacTel states that while the 1910-1930 MHz band is adequate to handle anticipated unlicensed simplex operation, additional bands at 1887.5-1910 and 1977.5-1990 MHz are needed for duplex operations. Ericsson asks that we consider a separate additional allocation of 100 to 150 MHz in the 5 GHz region for high-speed, high-capacity wireless LANs. Several parties, such as Apple, IEEE Project 802, Rose Communications, Inc., and Teknekron Communications Systems, also advocate a reserve for future unlicensed use.

82. The parties addressing unlicensed PCS issues almost universally express concern about possible interference from unlicensed PCS devices to existing fixed microwave operations. In this regard, parties representing both fixed microwave interests, for example Alcatel Network Systems, Inc. (Alcatel), API, and the Northwest Iowa Power Cooperative, and parties interested in the development of unlicensed PCS services and devices, such as Apple, Motorola and WINForum, submit that unlicensed devices cannot share the band with incumbent microwave licensees without risking unacceptable levels of interference. These parties also submit that the "nomadic" nature of such

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[72] IEEE Project 802 is group within the IEEE that is chartered to develop standards for local and metropolitan area networks that provide high speed information transfer among computers on wire, optical and radio media.

[73] WINForum is an alliance of information technology companies that are working together to obtain and effectively employ spectrum for unlicensed, user-provided voice and data PCS.

equipment would make it difficult to detect and eliminate sources of interference. UTC, Telocator, ROLM, NATA, Motorola, Hitachi and California Microwave advocate creation of some form of industry consortium, committee, trade association or other entity to fund relocation of incumbent microwave licensees out of the band.

83. On May 14, 1993, the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management (UTAM) filed a proposal to establish a temporary open industry entity that would assume relocation and spectrum management functions for the unlicensed band pursuant to Section 332(b) of the Communications Act.[74] In its proposal UTAM recommends that we require, under our equipment authorization rules, that all unlicensed device manufacturers contribute to a fund from which UTAM would compensate incumbent licensees for relocation and finance its spectrum management efforts. UTAM further recommends that we permit early deployment of "non-nomadic" unlicensed PCS devices on a spectrum-sharing basis prior to complete band clearing.[75] We requested comment on UTAM's proposal in a Public Notice released May 18, 1993.[76]

84. The comments received in response to the Public Notice strongly support the concept of an industry entity such as proposed by UTAM. Many commenters, including AT&T, Industrial Telecommunications Association (ITA), McCaw, Motorola, NATA, Northern Telecom, PCS Action, Inc. (PCS Action), and ROLM, fully support the UTAM proposal as submitted. Others, mainly incumbent microwave interests and some potential PCS licensees, request more detail on the proposal and raise a number of specific issues on how such an approach would work in practice. For example, several parties question UTAM's ability to raise sufficient funds to pay for relocation of existing microwave facilities. Other parties question whether early deployment of non-nomadic devices should be allowed as proposed. Some commenters, such as Ameritech and the Association of American Railroads (AAR), express concern over this aspect of the proposal because of the perceived difficulty in controlling the operating location of such devices once initial frequency coordination has been

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[74] UTAM is composed of representatives from a broad range of equipment manufacturers interested in deploying unlicensed PCS devices. Members of UTAM include NATA, Telocator, AT&T, Alcatel, Ericsson, IBM, Intel, PCNS-NY, Metrocall, Motorola, Northern Telecom, Omnipoint, ROLM, Rose, Telesciences, and U S West.

[75] UTAM defines "non-nomadic" devices as those utilizing a fixed infrastructure and "band clearing" as the point in time at which interservice interference is no longer deemed a concern.

[76] See 58 Fed.Reg. 31183 (June 1, 1993).

accomplished. Southwestern Bell Corporation (Southwestern Bell), UTC and API oppose any deployment of non-nomadic devices prior to complete band clearing since they believe that the proposed safeguards against potential interference are inadequate.

85. API expresses concern that there should be a mechanism in place to ensure adequate capitalization of the entity before any band clearing commences. Omnipoint indicates that it is necessary to ensure that the royalty scheme creates a level playing field, and that such scheme be worked out in advance of any Commission approval of the entity. Xircom and AMT/DSST express concern that early deployment of non-nomadic devices will leave no room for nomadic devices by the time the band is cleared. PacTel expresses concern about lack of procedures for resolving internal unlicensed PCS industry disputes such as might arise over which geographical regions should be cleared first. The Public Safety Microwave Committee opposes any deployment of nomadic devices in the proposed unlicensed band since public safety microwave users are not required to move.

86. In its reply comments, UTAM indicates that it had proceeded to further develop its concept by incorporating an entity to function as a mechanism for unlicensed spectrum clearing and adopting a preliminary set of bylaws. The entity was incorporated under the name of UTAM, Inc., in the State of Delaware as a not-for-profit membership corporation. UTAM indicated that start-up capital for relocation and operating expenses would come from a combination of membership fees, outright funding from members, loan agreements with financial institutions, and royalties paid by manufacturers of unlicensed PCS devices. UTAM also proposes some further safeguards to address those parties concerned that non-nomadic devices may be moved after coordination. UTAM also clarifies that it intends to abide by the procedures established in ET Docket No. 92-9, and that its role will be limited to representing unlicensed PCS manufacturers' interests in interference and compensation disputes with incumbents.[77]

87. We continue to recognize the important opportunities that unlicensed PCS offers for creation of new services and technologies. The current Part 15 unlicensed operations have proven successful in bringing forth a wide variety of services and devices. Part 15 devices now are used to provide important

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[77] See Third Report and Order and Memorandum Opinion and Order, supra note 10, at paras. 34-35. In this document, the Commission strongly encourages parties unable to voluntarily conclude a relocation agreement to use alternative dispute resolution techniques. If voluntary negotiations are unsuccessful during the period prescribed, the parties may refer the matter to the Commission for resolution.

services for business, such as control of manufacturing processes and anti-pilfering protection, and also essential health and safety functions such as medical patient monitoring and security and alarm systems. In addition, a large number of Part 15 devices like cordless telephones, garage door openers and electronic toys serve to enhance consumer convenience and recreation. We believe that a substantial allocation dedicated for unlicensed PCS will have the potential to foster development of an even greater number and range of new wireless services and devices.

88. In view of the strong demand for unlicensed PCS predicted by those developing such services, we are allocating the 1890-1930 MHz band for unlicensed PCS services. We believe this 40 MHz will provide sufficient spectrum to meet the needs of a wide range of unlicensed PCS operations, including both voice and data uses. To ensure that unlicensed PCS uses do not cause interference to existing microwave operations, we are adopting the general approach recommended by UTAM. Further, we are designating UTAM as the coordinator for the transition of the 1890-1930 MHz band from fixed microwave service to unlicensed PCS, conditioned on UTAM's submission and our acceptance of: 1) a funding plan that is equitable to all prospective manufacturers of unlicensed devices, and 2) a plan for "band clearing" that will permit the implementation of nomadic devices and, in particular, nomadic data PCS devices, as promptly as possible.[78] We intend to obtain public comment on these plans before acting on them. With regard to relocation of existing microwave stations, UTAM's responsibilities will include administering the program, including negotiating costs of relocation, ensuring comparable facilities are provided, and resolving any disputes of interference to fixed microwave from unlicensed PCS operations. As with the licensed service, if interference disputes or agreement for relocation of incumbent fixed microwave facilities are not successfully negotiated, the matter may be referred to the Commission for a final decision.

89. We agree with UTAM and the commenters that at this time the locations of PCS devices must be controlled to avoid causing interference to incumbent fixed microwave licensees. UTAM's proposal to permit "coordinatable" devices during an initial transition period, during which UTAM would coordinate the locations appears to be a reasonable approach. As suggested by UTAM, such devices include unlicensed PCS devices and systems

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[78] At a minimum, such a plan should include estimated time tables and priorities for clearing significant portions of both subbands of the 1890-1930 MHz unlicensed band. The plan also should address specifically the issue of nomadic data PCS devices and how the plan ensures that such devices can be implemented as expeditiously as possible.

that are intended for one-way or two-way communications over limited geographic areas. They comprise both voice and data applications such as wireless PBXs and wireless data local area networks. These systems also may include associated portable devices, provided that the portable devices have been designed to operate under the control of a coordinated base station or within a limited coordinated service area. Subject to UTAM's submission, purely nomadic unlicensed PCS devices and systems in which the geographic location of the device cannot be controlled will not be permitted until the unlicensed spectrum is cleared or it can be shown that there is little risk of interference to the remaining incumbents.

90. As discussed above, we conclude that allowing access to this band for devices that can be coordinated will not preclude later implementation of nomadic devices because the technical rules that we are adopting, based upon the "WINForum etiquette," ensure access by both nomadic and non-nomadic data and voice devices. The 40 MHz of spectrum we are allocating for unlicensed PCS is sufficient to satisfy the demand for both nomadic and non-nomadic applications. By allowing the early introduction of non-nomadic devices, both data and voice, manufacturers will have a source of revenue that could be used to finance the relocation of fixed microwave operations. We note that many anticipated unlicensed PCS devices fall within the definition of non-nomadic because they will involve communications through a base station or network of base stations that can be controlled.

91. To ensure that incumbent microwave stations do not receive interference from unlicensed devices, we are requiring that any coordinatable unlicensed PCS device or system be coordinated through UTAM before being initially deployed or subsequently relocated.[79] In addition, we are requiring applicants for equipment authorization for unlicensed PCS devices to be participants in UTAM. As part of the equipment authorization process, all manufacturers will be required to demonstrate procedures to assure that the fixed portion of their system (i.e., the base station) will not be activated until installation at its authorized location is verified and that relocation of the system or device will not occur without recoordination. We also are requiring that manufacturers demonstrate that any movable components (i.e., handsets or

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[79] We anticipate that UTAM will initially arrange for the preparation of exclusion zone maps detailing geographic areas and frequencies where coordinated PCS deployment would not cause interference to existing microwave operations; and that UTAM will maintain and update a database of all microwave links and unlicensed PCS systems/devices using the allocated spectrum. This would permit the tracking of deployed unlicensed PCS devices and systems. See UTAM ex parte filing dated September 14, 1993.

terminals) of the device or system will be prevented from transmitting if those parts leave the coordinated area around the base station.

92. On September 13, 1993, Apple submitted an "Emergency Petition" addressing a number of issues related to operation and introduction of unlicensed PCS devices in the 2 GHz band. Apple's petition was filed three days before our "Sunshine Rules" resulted in cutting off all comment on the proceeding as a whole, including on the Apple petition.[80] Consequently, many parties did not have an opportunity to file comments supporting or opposing the petition.[81] We agree with Apple that the early introduction of nomadic PCS devices is desirable, and therefore that it is in the public interest to obtain public comment on the petition in order that we may be fully informed by all interested parties on these issues. Accordingly, by Public Notice we will solicit comment in response to the Apple petition. Further, we are delaying the effective date of rules related to Apple's petition for an additional thirty days to permit full consideration of the issues raised by Apple.

3. PCS Support Spectrum

93. In cases where a PCS system would operate in a cellular configuration, the PCS cell sites, like cellular cell sites, must be connected to a central switching node. The communications path used to make this connection is commonly referred to as a "backhaul link" and could be either a wired link, such as fiber optic cable or cable television plant, or a radio link. In such PCS systems, there will also be similar requirements for connecting one cell to another. Where these supporting communications links operate on wireless facilities, they generally do not use the spectrum allocated to the mobile service, but instead use frequencies allocated for fixed microwave. Currently there are a number of frequency bands allocated to fixed microwave service that can support requirements for mobile service backhaul links.[82]

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[80] 47 C.F.R. § 1.1203 et seq.

[81] In response to Apple's petition, comments were filed by UTC, API and the Business Software Alliance.

[82] This approach will ensure that incumbent microwave licensees will not be subject to unexpected displacement, and is consistent with the plan we adopted for relocating fixed microwave stations in the emerging technologies proceeding, see Third Report and Order and Memorandum Opinion and Order, supra note 10. Under those rules, incumbent fixed microwave operations cannot be involuntarily relocated for a period of two years from

94. In the Notice, we tentatively concluded that adequate spectrum is already available to provide fixed microwave support for PCS services and therefore declined to propose allocating additional spectrum for that purpose. We requested comment, however, on whether additional spectrum is needed for PCS support operations and on whether rule changes requested by APC are needed to provide for more efficient channeling plans in the bands already allocated for fixed microwave service.

95. The majority of the commenting parties do not address our tentative conclusion that adequate spectrum is already allocated to the fixed microwave service. APC, Harris Corporation-Farinon Division (Harris), and Qualcomm propose setting aside specific bands for PCS support services. APC recommends that the 37.0-39.5 GHz band be made available for the connection of PCS base stations.[83] APC believes that it is important to authorize specific frequencies for PCS backhaul operations. APC points out that this allocation would be consistent with the allocation provided in the United Kingdom to support services similar to PCS.[84] Harris recommends that the 27.5-29.5 and the 37.0-38.6 GHz bands be channelized to accommodate PCS support services. Qualcomm supports rule changes to the 37.0-38.6 GHz allocation to accommodate PCS support services. These parties argue that their proposals would permit PCS licensees to begin service without overburdening other microwave frequencies.

96. We continue to believe that the spectrum already allocated for fixed microwave services is adequate to support PCS operations. As we observed in the Notice, many of these support operations can be provided through facilities such as fiber optics, wireline telephone services and coaxial cable, that do not require use of radio. Accordingly, we are not allocating additional spectrum to support PCS operations at this time. If it appears that the lack of dedicated spectrum or additional standards such as channelization are impeding the development of PCS, we will revisit this issue.[85]

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the date the Commission first begins accepting applications for use of the spectrum.

[83] The 37.0-38.6 GHz band is allocated to the fixed and mobile services for both Government and non-Government use.

[84] The United Kingdom has allocated the entire 37.0-39.5 GHz band to these uses.

[85] It should also be noted that we do not have sufficient information or record to determine an appropriate channelization scheme for spectrum supporting PCS operations. We further note that an appropriate channelization plan may be dependent on the

D. Licensing Issues

1. Eligibility Requirements

a. Cellular Licensees

97. In the Notice, we observed that PCS and cellular licensees serving the same area, while perhaps not offering identical services, will compete on price and quality. We therefore stated that competitive benefits may be reduced if cellular incumbents are permitted to acquire PCS licenses within their service areas. Accordingly, in the Notice, we proposed to allow cellular providers to obtain PCS spectrum licenses outside of their cellular service areas and asked for comment on whether they also should be allowed to obtain PCS spectrum within their service areas. We requested comment on determining ownership, proposing to adopt the ownership standard that governs applications for cellular service for markets beyond the top 120 MSAs and all RSAs. Under this standard, no party with an ownership interest, direct or indirect, in a cellular license could have an ownership interest, direct or indirect, in a PCS license serving the same geographic area, except that interests less than one percent would not be considered (or less than five percent for publicly-traded corporations).[86]

98. In addition, we asked for comment on whether the cellular service rules should be further liberalized to allow cellular firms to make better use of their existing frequencies. Specifically, we proposed to revise Section 22.930 of our rules to state explicitly that cellular licensees may provide PCS-type services, such as, wireless PBX, data transmission and telepoint services.[87] We proposed to remove the prior Commission notification requirement to allow cellular carriers to respond more effectively to competition from PCS providers. We also asked whether cellular carriers should continue to be required to provide analog service compatible with the requirements of OST Bulletin No. 53,[88] and what would be the impact of removing

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architecture(s) chosen for the provision of PCS services, so that it would be premature to address this issue at this time.

[86] See 47 C.F.R. § 22.921(b).

[87] See 47 C.F.R. § 22.930.

[88] See Notice, supra note 4, at para. 70.

service requirements on compatibility and roaming for current subscribers using analog units.[89]

99. The majority of the commenting parties support allowing cellular providers to obtain PCS spectrum outside of their service areas. The commenting parties are split, however, on whether to permit cellular providers to be eligible for PCS spectrum within their cellular service area. A few parties, including Advanced Cordless, California PUC and ROLM, argue that, to avoid the potential for anticompetitive behavior, cellular providers should be excluded from obtaining PCS licenses anywhere.

100. Parties that support allowing cellular providers to be eligible for PCS licenses within their service areas submit that this approach would promote the early development of PCS by taking advantage of cellular provider expertise, economies of scope between PCS and cellular service, and existing infrastructures to provide early deployment of PCS. For example, Vanguard Cellular Systems, Inc. (Vanguard) states that existing cellular operations offer numerous technical, marketing and other economies that would promote the rapid deployment of PCS and achieve significant savings in construction and operation costs. Bell Atlantic states it would be grossly inefficient to deny cellular carriers the opportunity to expand the range, variety and diversity of their current offerings in new ways, particularly in light of cellular operators' considerable managerial, technical and commercial capabilities.

101. Parties arguing for exclusion of cellular licensees within their service areas base their arguments upon concern for potential unfair competitive advantages that cellular operators might have over PCS licensees. These parties contend that cellular operators already have enough existing spectrum to provide PCS-type services. Time Warner argues that cellular systems can already provide PCS within their existing bandwidth and many cellular companies have already announced their intentions to do so. According to Time Warner, authorizing new service providers, rather than licensing additional spectrum to cellular operators, will encourage competition by new entrants.

102. With regard to cellular ownership standards, the commenting parties generally believe the existing standards (one percent for individuals and five percent for publicly-traded corporations) are too restrictive. They propose alternatives that would employ either a higher fixed eligibility percentage, or a formula based upon differences between population size or

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[89] See Liberalization of Technology and Auxiliary Services Offerings in the Domestic Public Cellular Telecommunications Service, Report and Order, 3 FCC Rcd 7033 (1988).

the size of cellular MSA/RSAs versus PCS licensing areas. For example, Ameritech suggests that only parties with an interest of over 25 percent of a cellular system should be excluded from obtaining a PCS license in the area served by that system. NTIA suggests allowing cellular licensees to hold a PCS license in their service area if the number of potential cellular subscribers in that area is a small percentage of all potential subscribers in the PCS license area. Sprint recommends that we adopt a rule allowing ownership by PCS licensees of non-controlling minority interests in cellular systems, or vice versa, of up to 30 percent. Sprint also provides a formula for calculating the proportion of ownership for eligibility purposes in cases where PCS service areas are larger than an MSA/RSA.

103. The commenting parties also generally support our proposal to liberalize the cellular rules to explicitly allow cellular operators to provide PCS services. Vanguard and Ameritech state that in addition to permitting cellular operators to provide PCS-type services without prior approval and notification, we should remove the requirement for cellular operators to provide analog service compatible with the requirements of OST Bulletin No. 53 in order to help create a level playing field for competition between PCS and cellular providers. Similarly, Ameritech recommends that the requirement for cellular licensees to provide analog service expire on December 31, 1999. The Department of Justice states that the requirement to support analog subscribers may be an issue better left to competition.

104. We recognize that participation by cellular operators in PCS offers the potential to promote the early development of PCS by taking advantage of cellular providers' expertise, economies of scope between PCS and cellular service, and existing infrastructures. We therefore conclude that the public interest would be served by allowing cellular providers to obtain PCS licenses outside of their cellular service areas. We believe this will foster a competitive market environment that will benefit consumers by lowering prices, improving service and increasing the availability of innovative products.

105. On the other hand, we are concerned with the potential for unfair competition if cellular operators are allowed to operate PCS systems in areas where they provide cellular service. We believe that constraints should be imposed on cellular ownership of PCS systems within their cellular service areas. Accordingly, where there is significant overlap of a designated PCS service area and a cellular licensee's service area, the cellular licensee will be eligible only for one of the 10 MHz BTA frequency block licenses. We will consider significant overlap of PCS and cellular services to occur when 10 or more percent of the population of a PCS service area (MTA or BTA) is within the cellular system's existing coverage area (i.e., the CGSA). We

find that an overlap of less than 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the cellular operator is slight. In applying this rule, the 10 percent population overlay limit will apply on a cumulative basis when a party owns attributable interest in more than one cellular system overlapping the PCS service area.[90]

106. Cellular licensees therefore will be eligible to hold PCS licenses on the same basis as all other eligible applicants in areas where their cellular service area covers less than 10 percent population of the respective MTA or BTA PCS service area's population. Within service areas in which there is 10 or more percent overlap between the cellular and PCS service areas, cellular operators will be eligible to hold only one 10 MHz BTA license (frequency blocks E, F, or G). This will permit local cellular operators to participate in providing PCS if they are successful bidders, yet insure that the remaining PCS spectrum is available for competitors.

107. With regard to ownership attribution standards for cellular operators applying for PCS licenses, we agree with the commenters that the existing standards in our cellular rules, one percent for individuals and five percent for publicly-traded corporations,[91] are too restrictive for determining whether a party with cellular interests is subject to the PCS eligibility restrictions and would be administratively burdensome. Our principal concern is that an incumbent cellular owner may exert undue market power. However, we also recognize that settlements encouraged by the Commission during the initial phase of cellular licensing may have resulted in the creation of certain partial, often passive ownership interest in cellular licensees, and we are concerned that we not foreclose such partial owners from participating in PCS. We believe that these two concerns are best accommodated by a test that allows ownership of less than 20 percent. Accordingly, we will permit parties with an interest of less than 20 percent in a cellular entity to hold PCS licenses. Conversely, parties with a 20 or more percent interest in a cellular entity may not have an attributable interest in a PCS licensee within its cellular service area as defined above, beyond one 10 MHz BTA license.[92] The 20 percent cellular

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[90] For example, if a party owns two cellular systems each having 5 percent population overlap in the PCS area, that party is deemed to have a 10 percent overlap with that area.

[91] 47 C.F.R. § 22.921.

[92] See also PCS attribution limits at para. 61 supra.

attribution limit will apply on a cumulative basis to all parties to a PCS license application with cellular holdings that overlap any portion of a PCS service area. In applying this 20 percent cellular attribution limit, all ownership interests in cellular operations that serve 10 or more percent of the population of the PCS service area will be included for the purpose of determining the extent of a PCS applicant's cellular ownership.[93]

108. We believe that this approach strikes an appropriate balance between fostering broad participation in PCS and ensuring that cellular operators do not exert undue market power. We recognize that this approach may restrict the opportunities of certain investors in cellular licenses to participate in PCS even if they have no meaningful involvement in the management of the cellular system and thus cannot influence its actions (e.g., "insulated" limited partners or non-voting shareholders with 20 percent or more interest). We believe, however, that to apply detailed attribution/insulation standards, such as our broadcast attribution rules,[94] would unnecessarily complicate licensing procedures and delay introduction of service to the detriment of the public. Accordingly we conclude that the public interest is served by the attribution tests we adopt.

109. As noted above, we will limit participation in PCS by cellular owners licensed to serve 10 or more percent of the population of the same service area. In conjunction with this overlap test, the 20 percent attribution test for cellular ownership interests should balance the competing interests presented by past Commission policies that actively promoted settlements of competing cellular license applications and our current policy of promoting entry by new providers and ensuring a competitive wireless market. While we conclude that a clear ownership test is better than one turning on fine legal distinctions of what constitutes "control", we nevertheless are concerned that some parties with cellular ownership interests will use our rules as an opportunity to control a local cellular licensee while retaining less than 20 percent ownership. Such occurrences would undermine our intent to limit cellular ownership in PCS, as detailed above.

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[93] For example, if five of the participants in a PCS corporation or consortium each have an ownership interest of 5 percent in a single local cellular licensee, the PCS corporation or consortium would be deemed to have a 25 percent cellular ownership interest and would be restricted to one 10 MHz frequency block in that PCS service area.

[94] 47 C.F.R. § 73.3555 notes.

110. We will review carefully any such instances in order to determine whether our intent to limit participation by cellular licensees in PCS service areas that overlap their cellular service area is being evaded or abused. Parties are on notice that we intend to reconsider this limit if we conclude that our intent to ensure competition between cellular and PCS could be undermined under the ownership rules we adopt today.

111. In the Notice we solicited comments on revising the cellular service rules to state explicitly that cellular licensees may provide PCS-type services without prior notification, such as wireless PBX, data transmission and telepoint service. We also sought comment on whether cellular carriers should remain bound to provide analog service compatible with the requirements of OST Bulletin No. 53. Commenters generally support rules to explicitly permit provision of new services without prior notification. Accordingly, we are revising the cellular service rules to state explicitly that cellular licensees may provide any PCS-type services, including wireless PBX, data transmission and telepoint service, without prior notification. We believe this provides cellular licensees flexibility to offer additional services as they partially convert their existing systems from analog to digital technology. With regard to repealing the analog service requirement of OST Bulletin No. 53, however, we believe the record is incomplete and therefore at this time decline to repeal the requirement.

b. Local Exchange Carriers

112. In the Notice, we stated that PCS is likely to be both a complement and potentially a competitor to local exchange carriers. We expressed our concern that the eligibility of LECs to hold PCS licenses within their service areas could provide an incentive for LECs to discriminate against PCS competitors requesting interconnection, and could lead to cross-subsidizing PCS operations from expenditures ostensibly made to serve rate-regulated wireline customers. We stated our belief that discrimination and cross-subsidization could be minimized by regulatory safeguards. We noted that most large LECs own or are affiliated with a cellular telephone system, but that separate subsidiary regulatory requirements for Bell operating companies (BOCs) prevent ownership integration to guard against cross-subsidization, discriminatory pricing, and other anticompetitive conduct. Additionally, we noted that there are economies of scope between PCS and the LEC wireline network that could not be realized if LECs were prohibited from providing PCS within their wireline service area.

113. We noted that LECs may naturally desire to develop their networks using wireless tails or wireless loops wherever they are more economical than wireline connections. We stated

that the LEC's existing infrastructure could easily be used for backhaul functions for wireless tails, and because of existing infrastructure LECs may be able to achieve competitive unit costs for certain types of PCS while using less spectrum. Additionally, we believed that permitting LECs to provide PCS service would encourage them to develop their wireline architectures to better accommodate all PCS services.

114. We concluded that there is a strong case for permitting LECs to provide PCS service. However, the separate subsidiary requirements imposed upon the BOCs preclude approximately 80 percent of the LEC industry from realizing any economies of scope between their wireline and wireless telephone services.[95] Therefore, we requested comment on whether to allow LECs to hold PCS licenses, except where barred by their cellular holdings. We also requested comment on eliminating the BOC separate subsidiary requirement for cellular telephone service.

115. We requested comment on the option of allowing LECs to acquire some 2 GHz spectrum for PCS within their service area, but less than the amount proposed for other licensees, while permitting them to hold regular 2 GHz PCS licenses outside their service area. We tentatively concluded that 10 MHz may be sufficient for the initial deployment of a PCS system integrated with a wireline carrier. We requested comment on whether a greater amount of spectrum would be necessary or whether a lesser amount would be sufficient. We also requested comment on whether this 10 MHz block should be an additional allocation from the emerging technologies band, whether PCS spectrum blocks should be divided to allow LECs, or any other entity, to acquire a portion of spectrum, or finally, whether to allow LECs to lease or purchase up to 10 MHz from other PCS licensees.[96]

116. We stated in the Notice that this 10 MHz block would be open to any entity and would not be set aside for use only by LECs. However, we requested comment on whether LECs with a cellular license should be eligible for this 10 MHz PCS spectrum, even if cellular licensees are not otherwise allowed to acquire PCS spectrum in their service areas.

117. The majority of the parties favor LEC eligibility in some form. However, they disagree on specific issues regarding such eligibility. Specifically, the parties address these

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[95] See Section 22.901.

[96] Commencement of service by LECs under any of these alternatives would be contingent on the LEC implementing an acceptable plan for non-structural safeguards against discrimination and cross-subsidization.

issues: 1) regulatory safeguards to prevent non-competitive behavior; 2) whether LECs and LECs with cellular interests should be permitted to participate in PCS and under what circumstances; and, 3) whether there should be a separate spectrum set aside for LECs or any other party. The views of parties with regard to these issues follow.

118. GTE, CTIA, McCaw, and others believe that LECs should be allowed a full opportunity to participate in PCS. PacTel believes that LEC participation will produce a broader access to and acceptance of PCS. Additionally, a number of parties argue that LECs constitute one of the more qualified and experienced parties ready to provide new PCS services. GTE claims that barring LECs from PCS could lead to large numbers of LEC customers migrating to PCS providers, thus damaging the existing wireline telecommunications infrastructure. GTE claims that 60 percent of the participants in its PCS trials have elected to replace their wireline telephones with PCS handsets. Further, GTE believes that if LECs are unable to provide PCS to their customers, many customers will leave and the remaining customers will be forced to absorb non-traffic sensitive costs by paying higher rates for basic service.

119. U S West argues that it would be unreasonable to bar telephone companies from PCS licenses because of their cellular holdings, as these holdings are organizationally and physically separated from telephone company operations. Additionally, U S West states that it has no cellular ownership in 86 MSA/RSA markets in its 14 state region, yet it has some cellular presence in at least a portion of all the Major Trading Areas in that region. It states that, thus, if telephone companies were rendered ineligible because of even partial cellular interests, it would be excluded from providing PCS.

120. The Chief Counsel of Advocacy of the U.S. Small Business Administration (SBA) states that it does not oppose LECs providing PCS if there are five licensees per service area. However, SBA contends that if there are only three licensees, restrictions should be imposed on the entry of LECs except for those areas that otherwise would not obtain PCS unless provided by an existing LEC. SBA argues that LECs may be the only party interested in providing the infrastructure needed for PCS in rural areas, and therefore prohibiting LECs from providing PCS may reduce rural areas to second-class status in wireless communications. The California PUC comments that we should only permit LECs to be licensed for PCS if they have not acquired any interest in a cellular entity and are barred from acquiring any interest in any other PCS license in the same geographic area. The California PUC further argues that state regulatory agencies should be free to fashion regulatory safeguards to ensure that providers of PCS may fully and fairly compete with LEC providers of PCS within the state, and to determine the appropriate

regulatory classification governing a local exchange carrier's intrastate provision of PCS.

121. Associated PCN, Freeman Engineering (Freeman) and others believe that LECs should be eligible for PCS licenses, but only if appropriate safeguards are applied to control the anticompetitive potential of common ownership of the LEC and a PCS system. Most of these parties also believe that LECs should be required to provide equal access and interconnection for all PCS operations. Associated PCN and others argue that LEC ownership of PCS systems should be subject to separate subsidiary and joint cost accounting requirements. Freeman Engineering submits that LECs operating a PCS service within their landline service area should be required to provide a reasonable and cost-based interconnection for PCS services. MCI contends that equal access and interconnection to LEC facilities is necessary to maintain the integrity of a complete nationwide telecommunications system. MCI proposes that rates for access and interconnection should be based on traffic sent to that interconnect, minus traffic coming from it at the same rates.

122. NTIA suggests that we provide guidance to LECs in developing nonstructural safeguards that address nondiscriminatory interconnection and installation practices, network disclosure, customer information, and cross-subsidization issues. NTIA also suggests that we consider replacing the existing structural separation of BOCs and their cellular operations with nonstructural safeguards to provide greater flexibility in their provision of PCS. GTE and others believe that our non-discrimination rules have been demonstrated to be adequate. Additionally, GTE claims that it is too early to specify any particular type of regulations for interconnection.

123. Comcast, Associated PCN and others oppose LEC eligibility for PCS licenses in areas where LECs also operate cellular services. For example, Comcast claims that LECs have a clear vested interest in maintaining control of a local exchange and have engaged in abusive marketing practices, predatory pricing and cross-subsidization in the past. Comcast claims that LECs have not provided fair interconnection to other radio common carriers despite the Commission's policy requiring them to do so. Comcast proposes that LECs not be allowed to provide PCS service in their local exchange area until competitive PCS local loop services are available to 50 percent of the residences in the relevant licensing area and at least 15 percent subscribe to PCS services or any other wireline alternate access service. As an alternative to permitting LECs that are also cellular operators to receive PCS licenses, APC proposes that we allow LECs to be eligible for PCS licenses only if they own less than 20 percent of a cellular system serving the same area where they would provide PCS service.

124. Others such as LiTel, Cox, and PCN America oppose allowing LECs to hold PCS licenses in their service areas regardless of whether the LEC also operates a cellular service in the area. These parties express concern that LECs have the market power and incentive to block development of competitive PCS services. Metrocall claims that allowing LECs or cellular operators to hold PCS licenses in a market where they now operate would provide them with a preference by reducing the number of parties available to provide competitive or substitute services in a given market.

125. APC, Horizon Cellular Group, NTIA and others oppose setting aside PCS spectrum for LECs. NTIA states that none of the spectrum allocated for PCS should be set aside for LECs.[97] On the other hand, Centel and others argue that one of the PCS frequency blocks in each service area should be reserved exclusively for LECs. Hughes Network Systems, Inc. (Hughes) and others believe LECs should not be limited to only 10 MHz. Hughes argues that LECs should be afforded the same eligibility as other parties for a full PCS license because they have a proven record of interest, experience, and accomplishment. It also believes that a full license may be needed to achieve universal coverage, which it claims is necessary for a viable PCS service.

126. While we recognize the concerns expressed about LEC participation in PCS, we also find that allowing LECs to participate in PCS may produce significant economies of scope between wireline and PCS networks. We believe that these economies will promote more rapid development of PCS and will yield a broader range of PCS services at lower costs to consumers. In addition, allowing LECs to provide PCS service should encourage them to develop their wireline architectures to better accommodate all PCS services. We also conclude, based on the record, that the cellular-PCS policies indicated above are adequate to ensure that LECs do not behave in an anticompetitive manner. Thus, no new separate subsidiary requirements are necessary for LECs (including BOCs) that provide PCS.[98]

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[97] More generally, NTIA argues that no spectrum should be set aside for any particular category of potential PCS applicants.

[98] See generally Computer III Remand Proceedings, 6 FCC Rcd 7571, 7614-26 (1991), appeal pending sub nom., People of the State of California v.. FCC, No. 92-70083 (9th Cir. filed Feb. 14, 1992). With regard to the structural separation requirement for BOCs and their cellular operations, see 47 C.F.R. § 22.901(b), we do not believe the record in this proceeding provides enough information for us to eliminate the requirement at this time as advocated by NTIA. Under our PCS rules, however, BOCs are free to choose whether or not they will provide PCS

Indeed, by seriously limiting the ability of LECs to take advantage of their potential economies of scope, such requirements would jeopardize, if not eliminate, the public interest benefits we seek through LEC participation in PCS. In addition, we do not believe that commenters have justified imposing additional cost-accounting rules on LECs that provide PCS service. Therefore, we will generally permit LECs to be eligible for PCS licenses. However, in areas where a LEC has attributable cellular interests (whether or not through a separate subsidiary), it will be eligible only for the PCS frequency blocks available for licensing to a cellular operator in its service area (frequency blocks E, F, and G).

127. While we find that LECs should be given the opportunity to participate in the provision of PCS services, we agree with those commenting parties that suggest that a specific set-aside for LECs would be unwise and unwarranted. We further believe that such a set-aside could defeat some of the benefits of LEC participation. For example, such an approach would not encourage LECs to develop their wireline architecture to better accommodate all PCS services but rather could lead to architectures optimized solely for use of the set-aside spectrum. We find no compelling rationale in the record that the public interest would be furthered by such a set-aside for LECs and will not adopt such an approach.

2. Licensing Mechanism

128. In the Notice, we described the various options available for selecting among mutually exclusive PCS license applications, including comparative hearings, lotteries, and competitive bidding. We tentatively concluded that comparative hearings would not be an appropriate PCS licensing mechanism because such a procedure was likely to be slower and more costly to both government and PCS applicants.

129. Section 6002 of the Budget Reconciliation Act authorizes the Commission to employ competitive bidding procedures to choose among mutually exclusive applications for licenses to use the electromagnetic spectrum provided that the service is one in which the licensee receives compensation from subscribers for the use of those frequencies. In addition, the Budget Reconciliation Act directs the Commission to implement competitive bidding procedures by rule making within 210 days of the date of enactment. Inasmuch as these amendments require a new proceeding, we will defer resolution of the issues relating to the PCS licensing mechanism and competitive bidding to the

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through their separate cellular subsidiaries.

rule making proceeding we are commencing today implementing this new authority.[99]

3. License Term

130. In the Notice, we proposed to establish the term of PCS licenses as 10 years, with a renewal expectancy similar to that of cellular telephone licenses under the rules then in effect.[100] The commenting parties support this proposal. For example, parties such as Adelphia/NewChannels, Mobile Telecommunications Technology Corporation, Metrocall, and others submit that the proposed 10-year term with a high renewal expectancy is necessary to ensure adequate investment in PCS infrastructure.

131. We continue to believe that our proposed license term and a significant renewal expectancy are appropriate for the PCS service. This relatively long period and high renewal expectancy will provide a stable environment that is conducive to investment, and thereby will foster the rapid development of PCS. Accordingly, we are adopting a 10-year license term for PCS and provisions regarding renewal expectancy that are similar to the revised rules that currently apply to the cellular service.[101]

4. Construction Requirement

132. Several commenting parties request that we adopt various schemes to ensure that service is promptly delivered to the public. They argue that the Commission should adopt build-out requirements to discourage speculation and warehousing of spectrum. They state that such construction requirements would ensure that only those applicants who are willing to invest

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[99] See note 21, supra.

[100] See former 47 C.F.R. § 22.941(a). The cellular renewal expectancy rules were subsequently modified on reconsideration. See Amendment of Part 22 of the Commission's Rules relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, 7 FCC Rcd 719 (1992), recon. granted in part, 8 FCC Rcd 2834 (1993), appeal pending sub. nom, National Cellular Resellers Association v. FCC, No. 92-1104 (D.C.Cir. filed Mar. 6, 1992).

[101] We recognize that we stayed in part, on our own motion, the cellular renewal expectancy rules pending judicial review. If those rules are reversed in court, we will have time to adopt new renewal expectancy rules for PCS before the 10-year license term expires.

substantial sums in the construction and operation of the systems they propose will seek licenses. Many argued that we should require aggressive construction and operational benchmarks.[102] APC suggests a five-year period from the grant of the construction permit in which a PCS licensee must build out its system to cover 75 percent of the population or area of its licensed area and that at the end of this five-year period "fill-in" the Commission should accept applications for any areas that PCS licensees have elected not to serve.[103]

133. Comcast and dbX Corporation suggest that we adopt benchmarks similar to those used in the 220-222 MHz licensing of private land mobile services, which would require PCS licensees to construct certain percentages of their systems by the end of two, four, six, and ten years.[104] McCaw states that we should impose minimum service coverage requirements within authorized service areas and/or requirements for minimum provision of service such as those imposed on cellular licensees.[105]

134. We believe that 2 GHz PCS will be a highly competitive service and that licensees will have incentive to construct facilities to meet the demand for service in their licensed service areas. While we do not believe that specific loading requirements are necessary, we find that 2 GHz PCS licensees should be required to meet a minimum requirement for operation and service to ensure that spectrum is being effectively utilized. We recognize that this spectrum is shared with fixed microwave operations and therefore may not be available immediately in its totality, but we conclude that in most service areas enough spectrum is available to initiate service. Therefore, we will require that 2 GHz PCS licensees offer service to one-third of the population in each market area within five years, two-thirds within seven years, and 90 percent within ten years of being licensed.[106] Failure by any licensee to meet the above requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.

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[102] Associated PCN at 19; Adelphia/NewChannels at 16.

[103] APC at 60.

[104] Comcast at 30 and dbX at 16.

[105] McCaw at 39.

[106] In demonstrating compliance with construction and coverage requirements, we will allow licensees to individually determine an appropriate field strength for reliable service in the PCS system. See note 130, infra.

E. Technical Standards

1. General

135. In the Notice, we proposed to adopt a technical framework for PCS that would permit significant flexibility in the design and implementation of PCS systems, devices and services. The standards we proposed were in conformity with the 2 GHz allocation proposed in ET Docket 92-9, which, as indicated above, have now been finalized. In the Notice, we observed that the large variety of PCS experiments supports a flexible approach to PCS technical standards. We also stated that an advisory committee on PCS was not necessary, since several industry standards bodies and the experimental licenses are already developing information in this area. We did, however, propose several technical restrictions on new PCS operations, such as power and height limitations, to avoid objectionable interference to existing microwave systems and between new PCS systems. We also proposed power output limits on unlicensed devices. We indicated these limitations would insure that existing microwave operations would be protected from harmful interference from both licensed and unlicensed PCS operations. We proposed this flexible approach to encourage the broadest range of PCS services and devices, to foster the most economic and efficient use of the spectrum, and to ensure that existing microwave systems are free from objectionable interference from new PCS operations.

136. In the following paragraphs we reach a series of decisions on technical standards for the PCS service. In reaching these decisions we have at each step of the way attempted to focus on two important concepts. First, we have tried to provide the maximum flexibility in technical standards so as to allow the new service to develop in the most rapid, economically feasible, diverse manner. Second, we have sought to assure that new PCS services will not cause harmful interference to existing microwave facilities or to each other.

137. We recognize that detailed technical standards for the provision of PCS could provide certain benefits. In the Notice, for example, we stated that roaming and interoperability are two important features of PCS and that such features could be fostered through adoption of technical standards. Many commenting parties agree with this observation and have suggested that a universal personal telephone number and the ability to make and receive calls from virtually any location are key concepts. These parties also have suggested that technical standards for PCS should be developed. At the same time, most parties recognize that PCS is at a nascent stage in its development and that imposition of a rigid technical framework at this time may stifle the introduction of important new technology. We agree, and find that the flexible approach toward

PCS standards that we are adopting is the most appropriate approach.

138. We further believe that our decision to provide for at least some large regional PCS licensing and to permit aggregation of PCS service areas and licenses will foster the technical capability for wide area roaming and interoperability. As noted above, we recognize that several industry technical and standards groups are addressing matters relating to technical standards for PCS both domestically and internationally. We continue to encourage the efforts of these groups and urge them to consider ways of ensuring that PCS users, service providers, and equipment manufacturers can incorporate roaming, interoperability and other important features in the most efficient and least costly manner. While we do not believe it necessary to prescribe standards at this time, we will closely monitor the efforts of industry standards-setting bodies to ensure that consumers and all PCS providers benefit from interoperability and seamless roaming capabilities of PCS systems.

139. The industry and standards-setting bodies should direct particular attention offering an emergency 911 capability that would work with enhanced-911 systems (E-911) and, to the extent feasible, permit locating a caller in situations where the caller is unable to state his location. We are particularly concerned that unless an E-911 capability is designed into PCS systems, dialing 911 from a PCS telephone will not be equivalent to dialing 911 from a traditional wired telephone. In an area served by an enhanced-911 system, one's address is immediately known when a traditional wired telephone is used. We urge parties to address this issue while equipment is still in the design stage. Accordingly, we contemplate initiating a proceeding in the future to address E-911 and related issues with regard to PCS, cellular, and any other relevant mobile service.[107] While we are not in a position at this time formally to require E-911 capability for PCS on the basis of the record before us, this is a matter of serious concern and we will closely monitor developments in standards-setting bodies and elsewhere regarding PCS and E-911. The health and safety of citizens, as well as the fullest commercial success of PCS, could be affected by whether PCS is E-911-capable.

140. We note that the information known about a cellular caller varies among jurisdictions, but never includes exact location. We believe that this disparity between wireline and cellular E-911 capabilities; and the future E-911 requirements for PCS, should be addressed given the rapid deployment of cellular and the prognosis of rapid and pervasive deployment of

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[107] NENA at 1-2 and APCO at 3.

PCS, and even predictions that PCS may replace the traditional wired network.

2. Licensed PCS Operation

a. Protection of Fixed Microwave Operations from PCS

141. A principal concern in the authorization of PCS in the 2 GHz band is that existing fixed microwave operations be protected. Our analysis and studies submitted by the commenters indicate that the 2 GHz band is not fully used in all areas and that PCS operations may be implemented in many areas without affecting current fixed microwave operations. In other instances, however, existing use of the spectrum will require negotiations to allow the implementation of PCS.[108] It is essential therefore that the rights of the existing 2 GHz fixed microwave operators to protection from interference be clearly defined.

142. Currently, criteria for insuring protection of private fixed microwave operations from other microwave operations is contained in Part 94 of the Commission's Rules[109] and further described in an EIA/TIA publication, TSB10-E.[110] This EIA/TIA publication provides methodology and criteria for coordinating microwave radio systems in the Private Radio Services. In the Notice, we proposed to provide microwave users with this same

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[108] In the Third Report and Order in ET Docket 92-9, supra note 10, the Commission adopted separate transition schedules regarding voluntary and involuntary negotiations periods for spectrum allocated for licensed services (two years voluntary and one year involuntary) and that allocated for unlicensed devices (one year involuntary). When it is necessary for a PCS licensee or representative of the unlicensed devices to negotiate with a fixed microwave licensee whose operations are in spectrum adjacent to that of the PCS provider then the transition schedule of the PCS provider will apply. For example, if a representative for unlicensed devices needs to relocate a fixed facility that is operating in spectrum allocated for licensed PCS then the transition schedule for spectrum allocated for unlicensed devices (one year involuntary) will apply.

[109] See e.g., Section 94.63, "Interference protection criteria for operational fixed stations," 47 C.F.R. § 94.63.

[110] See Electronic Industries Association/Telecommunications Industry Association's "Telecommunications System Bulletin No. 10-E, Interference Criteria for Microwave Systems in the Private Radio Services," (TSB10-E), November, 1990.

level of protection from interference from PCS operations. We called attention, however, to the fact that the TSB10-E methods and procedures were based on interference between private fixed microwave systems, and would have to be modified to take into account PCS base and mobile operations. To this end, we proposed that each PCS licensee should determine the potential interference to each microwave receiver by calculating the signal level from each proposed co-channel and adjacent channel PCS base station and associated mobiles within a coordination zone.[111] The total power level into the microwave receiver would be determined by assuming straight power addition of the signals from all of the PCS licensee's stations.

143. To make this determination, PCS licensees would be required to calculate the total PCS power level at the subject microwave receiver from each PCS base station and its associated mobile and portable stations after allowing for various propagation losses. The analytical procedure for making this determination was described in Appendix F of the Notice.[112] If the total PCS power level at the microwave receiver exceeded the standards described in TSB10-E, then the PCS licensee would be required to make the changes necessary to its system to bring it into conformance with the TSB10-E standard. If additional base stations were added to the system, each licensee would again have to ensure that its total system was within the TSB10-E standard. Alternatively, the PCS operator would be permitted to certify to

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[111] The 2 GHz private microwave band is divided into 5 and 10 MHz wide overlaid channels. See 47 C.F.R. § 94.65(b). This overlay scheme creates co-channel, interstitial channel and adjacent channel relationships. For fixed microwave services, bulletin TSB10-E describes interference criteria for these three situations. Overlaying a PCS channeling plan consisting of up to 15 MHz wide channels results in system relationships that are not covered by this bulletin.

[112] The procedures in Appendix F proposed calculation of equivalent radiated power from base stations and associated mobiles and portables taking into consideration shadowing losses due to buildings in urban and suburban areas and building penetration losses and height gains associated with portables operating in or on the roofs of buildings. These factors were incorporated in terms of weighting factors to be based on statistical information concerning building height distribution and number of mobiles and portables expected to be active in a given area at a given time. The equivalent radiated power would be used with the Longley-Rice propagation model to calculate path loss between a PCS base station site and each pertinent microwave receiver. This calculation would take into consideration terrain, antenna gain of the microwave system and time fading of the PCS signal.

the Commission that the licensee of an affected microwave system had agreed to the proposed PCS operation.

144. The Notice requested comments on the proposed method for determining interference to microwave operations, including the appropriateness of the TSB10-E standards, the summation of PCS interference power at a microwave receiver, the various computational procedures and criteria as described in Appendix F of the Notice, and the use of the Longley-Rice propagation model. We also asked for comments on whether there were other methods capable of providing more flexibility in the design of PCS systems and still provide adequate protection to incumbent fixed microwave operations, including a proposal to use different coordination criteria based on microwave path length.

145. Of those commenters who felt that sharing was feasible, a majority endorsed in general the use of the TSB10-E standards for protecting microwave operations, but some felt they were too conservative and others felt they were not conservative enough. There were also a wide range of questions and counterproposals concerning the proposed procedures for adapting these standards to protection of microwave operations from PCS interference. The issues raised by the commenting parties can generally be placed in the following categories: 1) use of the EIA/TIA Bulletin TSB10-E standards; 2) antenna height and power limits for PCS; 3) coordination distance, and, 4) calculating interference from PCS to microwave, as proposed in the Notice Appendix F.[113] These issues are discussed below.

146. Use of Bulletin TSB10-E Standards. The majority of the commenting parties generally support our proposed use of the TSB10-E standards. AAR, for example, endorses use of the TSB10-E standards. Harris and API agree that the interference standards for protection of microwave operations currently contained in Part 94 of the rules are appropriate, but suggest that the TSB10-E criteria need to be strengthened for protection against PCS operations or applied in a conservative manner. LCC Inc., a company engaged in engineering and design of wireless and cellular systems, supports the use of criteria based on TSB10-E and suggests that the Commission incorporate future updates of these standards. The Public Safety Microwave Committee (PSMC) agrees that the TSB10-E standards provide a valid starting point. Northern Telecom states that with some "fine tuning" TSB10-E standards can protect both parties without unnecessarily limiting PCS access. It proposes that the Commission (or a Commission-

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[113] These procedures include: use of aggregate PCS power to calculate interference; use of point source for PCS mobiles and portable aggregates; building penetration and shadow losses; and weighting factors for number of portables inside buildings and on rooftops.

authorized third-party) establish a database of all existing microwave transmitter and receiver sites. Northern Telecom also urges the use of beacon control channels to control frequency use and transmit power of bases and mobiles. The Lower Colorado River Authority (LCRA) suggests that an overall protection standard such as TSB10-E or an equivalent is critical, but that microwave licensees should be permitted to request that PCS licensees recalculate interference levels at specified time periods to ensure compliance with the standard.

147. UTC supports interference standards for protection of fixed microwave systems, but expresses concern that as a practical matter it will be difficult to develop adequate interference criteria without first knowing the operating characteristics of the technology to be placed in the band.[114] UTC contends that the TSB10-E standards were designed to protect against interference between and among private fixed microwave systems and therefore may not be adequate to protect against interference from PCS base and mobile operations. Because of this, and the fact that the architectures and operating parameters of PCS systems are still undefined, UTC suggests that the protection criteria be set, at least initially, to eliminate any doubt that microwave systems will be fully protected. They believe that relaxing the criteria should only be considered after experience is gained through actual PCS deployment. UTC further contends that PCS licensees should be required to calculate the interference potential to a microwave system without regard to any special spectrum-sharing techniques; that PCS mobile stations should not be capable of transmitting without prior authorization from an associated base station, and that each base station should be limited to the number of mobile units upon which the licensee's interference calculations were made.

148. A number of potential PCS service providers oppose the use of TSB10-E standards and argue that these standards are overly restrictive on PCS operations. A number of these parties also suggest alternative criteria. For example, APC opposes use of the TSB10-E standards as too stringent for PCS-microwave sharing. APC proposes criteria which focus on protecting microwave path availability instead of protecting a fade margin as is the case in TSB10-E. Bell Atlantic contends that the proposal to use TSB10-E is unduly restrictive and inappropriate for use in the PCS content and that any proposed interference standard should take into account that current microwave users have over-designed their existing facilities. PCN America also contends that the TSB10-E interference criteria are much too

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[114] UTC suggests that interference analyses should consider microwave path length, e.g., use a C/I ratio for short and medium paths and the existing 1 dB degradation of threshold for longer paths.

conservative. It contends that the majority of microwave systems are over-engineered with huge fade margins and that, in the interest of spectral efficiency, microwave system protection requirements should be based upon a standard reliability figure. In addition, PCN America indicates that techniques such as space, angle and frequency diversity, can further improve microwave system reliability, and are not currently taken into account in TSB10-E. Corporate Technology Partners proposes use of interference sensing technology which senses the level of fixed microwave signals and automatically adjusts to avoid interference to or from microwave systems.

149. A number of parties suggest that the development of new sharing criteria between PCS and microwave users should be left to industry either with or without direct Commission intervention. Comcast contends that the proposed interference standards are extremely conservative and overly complex and that application of these standards to interference from mobiles and portables would be cumbersome and inappropriate. Comcast urges that we direct industry standards bodies to develop a procedure for calculating interference level from PCS. Similarly, Motorola contends that, in the absence of substantive changes, the TSB10-E standards are too conservative and their use could severely reduce the potential for sharing.[115] Motorola suggests that as long as the industry is continuing to address these issues constructively, direct Commission prescription of coordination standards is unnecessary and that the rules should provide flexibility to incorporate industry consensus revisions to coordination documents like TSB10-E. Comsearch notes that TSB10-E is being rewritten and suggests that the resulting standards will serve as a sufficient guideline for solving coordination issues between microwave and PCS systems. Sprint proposes that industry standards bodies should be allowed to suggest appropriate interference models based on actual measurements. Sprint submits that the new revision of TSB10-E is more appropriate for PCS and allows for greater flexibility in calculating acceptable interference levels. Sprint further proposes that microwave users be able to periodically request recalculation of interference levels or that actual measurements be made.

150. On the basis of the record, we believe that with certain modifications, as described below, the level of protection provided under Part 94 of our rules and through the use of TSB10-E criteria and methodology is appropriate and will

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[115] Motorola suggests changes to TSB10-E to eliminate the following problem areas: protection of fade margins rather than path availability, over protection of short paths, 40 dB fade margins for analog links, misuse of "practical threshold" and grandfathered excessively high power levels.

provide adequate protection to microwave users from PCS operations.[116] These standards, in general, will provide microwave users with the same level of protection as they are now afforded with regard to other microwave operations. Accordingly, we are adopting this general approach as proposed in the Notice.

151. In developing protection criteria for fixed microwave operations, we agree with those commenting parties such as APC, PCN America, Motorola and others that indicate that many microwave links, in particular those of short and medium path length, are in most cases engineered with margins that are far beyond that needed for reliable operation. We believe that protecting such excess margins would unnecessarily restrict PCS operations and would reduce the amount of sharing possible. We find that a carrier-to-interference (C/I) standard is more appropriate in such cases. The principle interference mechanism in the case of short and medium length fixed microwave paths is intermodulation caused by the presence of other signals, rather than noise effects. We are therefore adopting C/I criteria for protection of short and medium length microwave links, that is where the microwave paths are 25 km (about 15 miles) or less.[117] For path lengths longer than 25 km (where reliability

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[116] As noted by several commenting parties, a TIA working group, TIA TR14.11, is currently in the process of preparing a new version of TSB10-E. This version has tentatively been identified as "Telecommunications Systems Bulletin No. 10-F, Interference Criteria for Microwave Systems" (TSB10-F), and will supersede TSB10-E when approved. The TIA working group developing these new standards includes representatives from a broad spectrum of organizations involved in the telecommunications industry and is explicitly addressing issues related to potential PCS interference to microwave operations. We note that our rules for private fixed microwave stations, e.g., Section 94.63(d)(2), currently provide that procedures developed by the EIA, the Institute of Electrical and Electronics Engineers (IEEE), the American National Standards Institute (ANSI) or any other recognized authority will be acceptable to the Commission for use in performing interference analyses. See 47 C.F.R. § 94.63(d)(2). These same provisions will be included in the PCS technical standards. Accordingly, we would accept the new TSB10-F, when adopted by EIA/TIA, for use demonstrating compliance with our technical standards for PCS to fixed microwave interference.

[117] We believe that the use of 25 km constitutes a conservative approach, since noise effects do not generally become predominant in the design of microwave systems until path lengths become significantly longer. In addition, we are adopting a "worst case" approach for the reference C/I level. This should ensure that fixed microwave stations are adequately

is more dependent on the relative noise threshold and faded signal level), we will continue to rely on the current Part 94 criteria which sets the limit on an interfering signal level to that which would cause a 1 dB degradation in the S/N ratio for analog systems or which would cause an increase in bit-error-rate (BER) from 10^{-6} to 10^{-5} for digital systems. We believe this approach strikes a reasonable balance between providing for PCS while at the same time fully protecting microwave systems.[118] This approach should also, to a large extent, alleviate the concerns expressed by Harris, API, LCRA and UTC concerning the adequacy of the TSB10-E standards for protecting microwave operations in the face of the many possible PCS interfering signal characteristics.

152. We recognize the potential benefits of the various innovative proposals to avoid interference to microwave systems by parties interested in providing PCS services. We believe that some of these approaches have potential for greatly increasing spectrum efficiency. However, we also agree with UTC that reliance on innovative technologies should be contingent on their demonstrated effectiveness. Therefore, such technologies may not be taken into account in determining compliance with the interference protection standards indicated above.

153. Antenna Height and Power Limits for PCS. In the Notice, we proposed to calculate PCS power at the input of the microwave receiver. We indicated that this method should be valid for any PCS power or antenna height and, in principle, imposition of specific limits were not needed. We noted that most PCS experimental systems could be accommodated under a requirement that permitted a maximum base station power of 10 watts (e.i.r.p.),[119] a maximum antenna height of 91 meters (300 feet), and a maximum mobile power of 2 watts (e.i.r.p.); and requested comment on adopting such limits. We also requested

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protected.

[118] Nothing in this approach would prevent PCS and fixed microwave from agreeing to use any other criteria on a voluntary basis. For example, the actual combination of PCS and microwave modulation methods and loading might indicate a lesser degree of microwave susceptibility, making it possible use a less stringent C/I, and thereby increasing sharing between the PCS and fixed microwave operations.

[119] Equivalent Isotropically Radiated Power (e.i.r.p.) is defined as the product of the power supplied to the antenna and the antenna gain in a given direction relative to an isotropic antenna.

comment on higher limits to make PCS service coverage equivalent to the maximum currently allowed for cellular.[120]

154. Several parties express concern that permitting high power and antenna heights could greatly increase the potential for microwave interference from PCS. A number of parties, such as LCRA and MCC, support limits on PCS power and antenna height of 10 watts and 300 feet for base stations and 2 watts for portables. They contend that higher powers and antenna heights would drastically increase the potential for interference to microwave operations. Northern Telecom favors low-power (under one watt) and low-antenna heights (less than 15 meters) for PCS systems and contends that the proposed high power/antenna height rules may significantly complicate and delay implementation of PCS.

155. Bell Atlantic recommends that PCS maximum power and antenna heights be set no higher than those in the cellular rules, but would permit higher power and antenna heights in cases where a need to exceed these limits can be demonstrated (e.g., large cells in rural areas) and where the interference criteria are not exceeded. Telocator contends that the only limits needed on power and antenna height are those needed to meet RF exposure guidelines. APC contends that no limitations are necessary if service extensions into adjacent markets are appropriately restricted and proper microwave coordination distances are established.

156. We continue to believe that most PCS operations can be readily accommodated under our proposed option to limit power to 10 watts (e.i.r.p.) for the base station and base station antenna height to 91 meters (300 feet) and mobile power to 2 watts (e.i.r.p.). Further, we also note that by establishing relatively modest power limits coordination with fixed microwave operations would be simplified and the potential for interference reduced. At the same time, we recognize that many PCS concepts are at a nascent stage and establishing too restrictive a limit may impede the development of certain PCS offerings. This may be the case especially for PCS services in rural areas. Accordingly, we believe that PCS operators should be permitted additional flexibility in the design of their systems and implementation of PCS technologies. We are therefore adopting a maximum power level of 100 watts (e.i.r.p.) and a maximum antenna height limit of 300 meters (HAAT) for PCS base stations and a power limit of 2 watts for mobiles. We will also permit higher

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[120] Cellular systems are allowed base station powers up to 500 watts with antenna heights up to 152 meters (500 feet), and even higher antennas are permitted with a corresponding reduction in power. Cellular mobiles are permitted up to 7 watts (e.r.p.) of radiated power. See 47 C.F.R. §§ 22.904 and 22.905.

antenna heights up to 2000 meters with a corresponding reduction in power. See Table 1. We believe that the greater flexibility afforded by this approach is important to the development of a robust PCS service, especially in areas where the population may be scattered. In order to offset any increased interference potential, we will require PCS licensees to specifically evaluate interference levels involving line-of-sight paths between microwave sites and proposed base stations lying within the main beam of a microwave receiving antenna.

Table 1: Reduced Power for Base Station Antenna Heights Over 300 Meters

HAAT		Maximum E.I.R.P.
Meters	(Feet)	(watts)
≤ 300	(984)	100
≤ 500	(1640)	65
≤1000	(3280)	30
≤1500	(4920)	15
≤2000	(6560)	10

157. Coordination Distance. In the Notice, we proposed to require that PCS operations be coordinated with existing fixed microwave operations based on the power and antenna height of the PCS operation. We stated that a coordination distance of 201 km (125 miles) appears reasonable based on a maximum PCS base station power of 10 watts and a maximum antenna height of 90 meters (295 feet).[121] We indicated that parties desiring to implement PCS operations would be required to demonstrate that their operations would protect all existing co-channel and adjacent channel microwave receivers within this coordination distance. We also recognized that if PCS stations are permitted greater powers and antenna heights, larger coordination distances would be necessary and proposed coordination distances as a function of the power and antenna height, as follows:

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[121] This is the same coordination distance specified in TSB10-E for new fixed microwave stations, and is based on our analysis of potential interference using the TSB10-E criteria from PCS operations to typical microwave operations with receive sites up to 1000 meters (3280 feet) above average terrain.

Table 2: Notice Coordination Distances In Kilometers (Miles)

EIRP (Watts)	PCS Base Station Antenna HAAT in Meters (Feet) 90 (295)	120 (394)	150 (492)	300 (984)	600 (1969)
10	201 (125)	206 (128)	211 (131)	225 (140)	246 (153)
20	228 (142)	233 (145)	237 (147)	251 (156)	274 (170)
50	262 (163)	267 (166)	272 (169)	286 (178)	309 (192)
100	290 (180)	294 (183)	298 (185)	314 (195)	336 (209)
200	315 (196)	320 (199)	324 (202)	339 (211)	364 (226)
500	351 (218)	356 (221)	359 (223)	375 (233)	399 (248)
1000	377 (234)	381 (237)	386 (240)	402 (250)	425 (264)

158. The commenting parties generally support the approaches proposed in the Notice. The majority of these parties favor the concept that coordination distance should not be a fixed value but rather a function of PCS base station antenna height and power. A number of parties, however, suggest that PCS base stations will generally operate at less than 10 watts transmit power and at lower antenna heights than 90 meters. These parties recommend that the coordination distances should be reduced in such cases.

159. AAR, for example, is in agreement with the proposed coordination distance but favors limiting PCS operations to 10 watts and an antenna height of 90 meters. Sprint agrees that coordination distances should be a function of antenna height and power outputs, and not a single number. They state that this methodology will provide maximum protection for the point-to-point microwave users while allowing maximum system engineering flexibility for the PCS licensees.

160. Comcast, Northern Telecom and others indicate that most PCS services will use base station power levels and antenna heights lower than the maximum allowed and, therefore, the table of required coordination distances should be expanded to include entries for lower powers and antenna heights. Motorola, in its comments, submits a revised table which establishes coordination distances for PCS base stations operating with powers as low as one watt at a height of 5 meters. According to these parties providing for smaller coordination distances will avoid unnecessary coordination expense for PCS licensees. Bell Atlantic points out that fixed microwave operations use antennas that have high gain and directivity, and the coordination concerns are greater than for PCS where antenna performance is more modest. Therefore, Bell Atlantic argues that coordination distances used for PCS could be smaller than that specified in TSB10-E.

161. A number of parties, such as Comsearch, Edison Electric Institute (Edison Electric), Telocator, and others, suggest that we should leave the development of the appropriate coordination distances to industry, in particular to the TIA working group TR 14.11. Edison Electric urges the Commission to adopt PCS/microwave interference standards that are consistent with those being developed by TR 14.11. Telocator, in its comments, indicates that it is currently working with the committee responsible for the EIA/TIA Bulletin and is confident that issues, such as coordination distance, will be successfully worked out by the industry.

162. Based on the record before us, we believe that the general approach proposed in the Notice is appropriate for the coordination of PCS and fixed microwave operations[122]. We also find that rather than adopt a single coordination distance it is more suitable to adopt an approach where the coordination distance is a function of the power and antenna height of the PCS base station. We also concur with those parties that suggest that the coordination distances should be reduced in those instances where the output power of the PCS base station is less than 10 watts and the antenna height is less than 90 meters. We therefore will adopt the suggestion that our table be amended to include lower powers and antenna heights. Table 3 extends the range to include coordination distances for powers down to 1 watt and antenna heights as low as 5 meters.

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[122] Consistent with our policies adopted in ET Docket No. 92-9, we will require PCS licensees to protect all primary fixed microwave operations. See note 7 supra at para. 21. The coordination distances adopted here define the area within which a PCS provider must show that no harmful interference will be caused to fixed microwave operations. Outside of the coordination area the PCS provider is still required to protect all primary fixed microwave operations, but it is the responsibility of the fixed microwave licensee to demonstrate that harmful interference will be caused to his facilities from the PCS operations.

Table 3: Coordination Distances In Kilometers (Miles)

EIRP (Watts)	PCS Base Station Antenna HAAT in Meters (Feet)													
	5 (16)	10 (33)	20 (66)	30 (98)	50 (164)	100 (328)	150 (492)	200 (656)	250 (820)	300 (984)	500 (1640)	1000 (3281)	1500 (4922)	2000 (6562)
1	99 (62)	103 (64)	108 (67)	112 (70)	119 (74)	131 (82)	140 (87)	148 (92)	155 (96)	161 (100)	182 (113)	219 (136)	248 (154)	272 (169)
2	120 (75)	123 (76)	126 (78)	129 (80)	134 (83)	142 (88)	149 (92)	154 (96)	159 (99)	164 (102)	185 (115)	222 (138)	251 (156)	275 (171)
5	154 (96)	157 (98)	161 (100)	164 (102)	168 (105)	177 (110)	183 (114)	189 (117)	194 (121)	198 (123)	214 (133)	242 (150)	264 (164)	283 (176)
10	181 (112)	183 (114)	187 (116)	190 (118)	195 (121)	203 (126)	210 (130)	216 (134)	221 (137)	225 (140)	240 (149)	269 (167)	291 (181)	310 (193)
20	207 (128)	209 (130)	213 (133)	216 (134)	221 (137)	230 (143)	236 (147)	242 (150)	247 (154)	252 (156)	267 (166)	296 (184)	- -	- -
50	241 (150)	244 (152)	248 (154)	251 (156)	256 (159)	265 (164)	271 (169)	277 (172)	282 (175)	287 (178)	302 (188)	- -	- -	- -
100	267 (166)	270 (168)	274 (170)	277 (172)	282 (175)	291 (181)	298 (185)	304 (189)	309 (192)	313 (195)	- -	- -	- -	- -

163. Calculating Interfering Signal Levels from PCS to Microwave. In the Notice, we proposed a methodology for calculating potential interference from a proposed PCS system to an existing microwave receiver. This included aggregation of power from PCS base and mobile stations, use of weighting factors for building losses and determination of appropriate propagation models. These matters are addressed below.

164. The majority of the parties addressing this issue generally supported the basic approach and methodology proposed. Several parties suggested changes regarding how specific calculations should be carried out. In general, existing microwave parties support more conservative methods using "worst case" assumptions while potential PCS providers suggest that other factors that would mitigate potential interference should be taken into account.

165. API and LCC endorse our proposed use of aggregate PCS power in interference calculations. UTC contends that until more is known about the viability of spectrum-sharing, calculations should be based on providing worst case protection. UTC states that interference calculations should be based on maximum summation of power from all parts of the PCS network and that line-of-sight path loss calculations should be used rather than a statistical model such as Hata. LCC recommends use of a point-to-point propagation model and believes that the propagation calculations should include the reflections from buildings as well as shadow loss. On the other hand, Sprint believes that potential interference levels should be calculated by considering only the signal level contributions of PCS base stations, portables and mobile units likely to be in use at any given time. Sprint believes the straight addition of power levels for all potential PCS devices is an overly conservative criterion. Sprint suggests that probabilistic models should be used to better estimate actual interference levels to be expected at point-to-point microwave tower receivers.

166. Motorola suggests use of the Hata model for both PCS to PCS and PCS to microwave interference calculations. In addition, Motorola recommends modifications in the procedure for calculating PCS interference, which they contend will allow greater flexibility for PCS operators without increasing microwave interference potential. In particular they suggest 1) allowing the use of an average station antenna height where all, or subgroups of, base station antennas are at a similar height and the distance to the microwave receiver is substantially greater than the radius of the area of base station distribution; 2) allowing PCS licensees to make system modifications within the aggregation limits without subsequent re-coordination; 3) allowing PCS licensees to de-aggregate mobile and portable power levels from the base station center where the cell is large and located relatively close to the microwave

receiver; and 4) adding a probability term to interference calculations to reflect the number of mobiles and portables that will be operational at any given time.

167. Matsushita points out that the proposed procedure for calculating interference from PCS would not be adequate if the separation distance between a PCS system and a microwave receiver is small compared to the coverage area of the PCS base station. PCN does not agree with our proposal to sum the PCS power. They call attention to the TSB10-E language which states that "interference analysis treats some number of individual potential exposures, each of which must be resolved independently." PCN argues that our proposal for summing powers imposes much stricter interference criteria on the PCS operator. Comcast proposes that PCS applicants and licensees should be required to specify the location of only those base stations that exceed 20 watts e.i.r.p. and 20 meters in elevation.

168. PCN agrees with our proposed approach concerning equivalent portable EIRP weighted according to estimated portion of portables expected to be operated inside buildings at any given time. They believe that 80 percent of the users in an urban area will be indoor users. PCN also believes that the loss from each floor to the outside of the building should be calculated based on the discrimination angle between the floor height and the microwave receiver antenna height. PCN recommends that a propagation model, such as TIREM, which takes into account actual terrain and obstructions in the interfering path be used for PCS interference calculations. It suggests that in situations where necessary data are unavailable, a statistical approach, such as the Hata model, would be vastly more accurate than assuming free space propagation.

169. CNet proposes that "the Commission's rules should permit the applicant or licensed system operators to submit detailed prediction techniques based on system engineering methods actually relied upon by the applicant or system operator, and are substantially corroborated by methods published and readily available in the public domain; or, b) are substantial corroborated by field measurement data."[123] CNet agrees with the 20 dB and 10 dB attenuation factors proposed for urban buildings and single-family homes, respectively, but suggests that the procedures for calculating interference from portable stations not permit specific building/height weighting factors. CNet suggests the appropriate worst case assumption for a portable operating from a balcony or rooftop would be a line-of-sight path and, therefore, that a free space loss formula should be used.

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[123] CNET at 6.

170. After reviewing the record, we are adopting the general procedure outlined in the Notice with minor modifications. The procedure we are adopting is described in Appendix D. It requires that the PCS licensee compute the sum of powers from proposed PCS base stations and all portable and mobiles associated with the base stations at each microwave receiver within the coordination distance of the base stations. The predicted power is determined from consideration of the interference e.i.r.p. of the base station; shadow losses due to buildings determined either on a statistical basis or deterministically (selection of procedure based on geometry and path length); path loss, including attenuation due to major terrain features and long-term signal variations; and characteristics of the microwave receiver, i.e., adjacent channel susceptibility, antenna gain, pattern and height, and line and other losses.

171. The total power for mobiles or portables associated with a given base station are treated as a single emission from a 5-foot antenna located at the base station antenna site, including certain weighting factors.[124] The antenna height used for computing path loss for indoor portables in an urban area is based on the average building height in a given cell and the assumption that portables will be evenly distributed over this height. In the case of a building which is more than twice the height of the average building height within a cell, the portables located above the cell average building height will be treated as a separate group. The calculation for indoor portables also includes consideration of building penetration loss as a function of building height.

172. The procedure we are adopting for calculating potential PCS interference also takes into consideration attenuation due to buildings through an urban area correction factor based on average building height and density.[125] Path loss in general, including the effects of terrain and long-term

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[124] For example, in the case of a service intended for business use in an urban area, one might expect that perhaps 85 percent of the portables in use at any given time would be operating from within buildings and perhaps 5 percent might be operating from rooftops or balconies. The remaining 10 percent would be outside at street level. These percentages would be subject to verification or modification based on actual experience after the system has been in operation for a suitable period of time.

[125] The urban area correction factor ranges from 10 dB for suburban residential areas to 35 dB for core areas of large cities.

signal variation, will be based on the Longley-Rice[126] propagation model, which is maintained by the NTIA/ITS as the Irregular Terrain Model (ITM).[127] While this model is generally conceded to have some shortcomings, at this time it is the only long-term general purpose model to have been widely tested against extensive U.S. propagation data.[128]

173. We agree with concerns expressed by Matsushita and Motorola that situations where the size of the base station coverage area (cell) is large compared to the distance between the cell and a microwave receiver require special treatment. In this situation, instead of assuming that all mobiles and portables are concentrated at the base site, we will require that the cell be subdivided and calculations be based on the expected distribution of mobiles and portables within each subdivision. We also agree that until more experience is gained we should take a conservative approach and assume that all PCS channels are active for interference purposes. With respect to Sprint's concern that the procedure for calculating interference is overly conservative and that probablistic interference models should be used, we note that the procedure being adopted does in fact take propagation losses due to buildings and terrain into consideration and allows for the statistical variation in these losses.

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[126] Longley, A.G. and Rice, P.L., "Prediction of Tropospheric Radio Transmission Loss Over Irregular Terrain, A Computer Method-1968," ESSA Technical Report ERL 79-ITS 67, Institute for Telecommunications Sciences, July 1968.

[127] Hufford, G.A., Longley, A.G. and Kissick, W.A., "A Guide to the use of the ITS Irregular Terrain Model in the Area Prediction Mode," NTIA Report 82-100, U.S. Department of Commerce, April 1982. See also Hufford, G.A., Memorandum to Users of the ITS Irregular Terrain Model, Institute for Telecommunications Sciences, U.S. Department of Commerce, January 30, 1985.

[128] Calculations based on the free space model may be permitted under special circumstances discussed below and the attached rules. It should also be noted that the Longley-Rice model yields free space losses under appropriate circumstances. We do not believe the Hata model is suitable for general PCS-to-microwave interference calculations. It is based on short-range data, i.e., less than 20 km; it does not take into consideration long-term signal variations, and while several investigators have suggested that the Hata model is compatible with their urban area measurement data, others have found that it does not agree with U.S. suburban data.

174. Concerning the suggestion that worst case assumptions be made concerning microwave interference, such assumptions would unnecessarily limit the deployment of PCS systems in a number of cities. We believe the procedures we are adopting with their built-in safeguards will adequately protect existing microwave systems. While detailed, deterministic calculations of interference taking into account shadow losses and reflections from individual building may be considered under special circumstances, their general use is not practical at this time. Although several investigators are experimenting with such deterministic models, current models have received limited testing and the detailed input data required for their use is not readily available at this time.

b. PCS-to-PCS Interference Standards

175. In the Notice, we stated that we would provide PCS operators with as much flexibility as possible in designing their systems with regard to potential interference between systems operating on the same frequency blocks (co-channel interference) or on adjacent frequency blocks (adjacent channel interference). We also stated that licensees would be expected to coordinate their operations at the service area boundaries. With regard to co-channel interference, the Commission proposed that PCS systems be designed not to exceed a signal level of 47 dBuV/m at the licensees' service area boundaries. With regard to adjacent channel interference, the Commission proposed not to establish interference limits at the frequency boundaries between PCS systems, but instead to allow PCS licensees to work out mutually agreeable interference concerns. We solicited comment on these approaches and requested specific limits and reasons if commenters feel that more detailed rules are needed.

176. Most parties, such as Motorola, Sprint, PacTel, and U S West, generally support the 47 dBuV/m signal level at the boundaries of the service areas. Motorola also suggests the use of the Hata propagation model. Similarly, LCC suggests that the effects of buildings be considered when adopting standards for interference. CNet agrees with the proposed signal level of 47 dBuV/m but suggests that alternative propagation studies for determining geographic service areas be acceptable as long as the method can be corroborated. Bell Atlantic suggests that the licensee's units operate at a signal level that correlates to a 10^{-5} raw bit error rate (BER) at the boundaries and does not cause any degradation beyond 10^{-5} raw BER in the adjacent or co-channel users. According to Bell Atlantic, the advantage of its proposal is that it would provide an incentive for introducing innovations such as error control coding, diversity, and adaptive power control resulting in a reduction of the net interference level and, in some instances, an increase in capacity. However, other parties, such as Telocator, state that technical standards

should be left up to industry standards groups. Finally, CTP asserts that it is not necessary to establish PCS-to-PCS interference standards and that PCS operators be allowed to sort out PCS-to-PCS interference issues among themselves.

177. Based on the comments, we continue to believe that it is desirable to provide some degree of PCS-to-PCS interference protection. We recognize that PCS operators in adjacent licensed areas may employ different technologies and that acceptable C/I (signal-to-interference) ratios between different technologies are unknown, which makes it impractical to determine a universal interference standard. In addition, we recognize that the proposed 47 dBuV/m signal level is derived from formulas[129] established for VHF/UHF mobile systems that employ analog FM modulation whereas PCS will employ other technologies. Nevertheless, we believe that a median signal level of 47 dBuV/m will enable licensees to provide service to the edge of their respective areas while limiting co-channel interference in adjacent areas to predictable levels which can be taken into account for planning purposes.[130] Inasmuch as co-channel

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[129] See Protection Ratios and Minimum Field Strengths Required in the Mobile Services, CCIR Report 358-5.

[130] Note that in adopting the value 47 dBuV/m for PCS to PCS interference planning purposes, the Commission is not specifying a minimum field strength for reliable service from 2 GHz PCS systems. The minimum field strength necessary for reliable service can be expected to vary from system to system, depending on the technology employed and other qualitative factors that can not be predicted at this time. However, 47 dBuV/m represents a relatively strong signal for mobile communications systems, and the minimum field strength(s) for reliable service from many PCS systems may well turn out to be lower (as was the case with cellular service). In demonstrating compliance with construction and coverage requirements, we will allow licensees to individually determine a minimum field strength for reliable service in their PCS system, taking into account the technology employed and other relevant factors. The 47 dBuV/m value will be used as a licensing device intended to allow a PCS licensee to provide service to the boundary of its market (MTA or BTA) while limiting the signal excursion over that boundary into another licensee's market. In this regard, we state from the outset that, unlike the cellular service, we will not authorize de minimis extensions of a 47 dBuV/m contour into any MTA or BTA. Because we intend to proceed rapidly in authorizing PCS, there should be no need for PCS licensees to serve adjacent markets on an interim basis. Furthermore, we will not authorize any extensions of a 47 dBuV/m contour into any adjacent MTA or BTA unless the same spectrum in that adjacent market is controlled by the licensee, or the licensee in the

signals at this level may be expected to interfere with each other, the operators in adjacent areas will be required to coordinate frequency use in the boundary regions. We will not establish adjacent channel interference limits at the frequency boundaries between systems, but expect licensees to work out interference concerns.

3. Unlicensed PCS Devices

178. In the Notice, we indicated our principal concerns with regard to the operation of unlicensed PCS devices and services were: 1) minimizing, to the extent possible, interference between PCS users and to existing microwave users; 2) providing designers with the maximum technical flexibility possible to develop new products to meet consumer needs; 3) using the available spectrum efficiently; and 4) providing PCS services to as many consumers as possible. In light of these concerns, we proposed that unlicensed devices operate in the 1910-1930 MHz band and proposed general power output limits and a channelization plan that would accommodated three broad categories of PCS devices, as follows:

Band (MHz)	Channel Bandwidth	Proposed Peak Power Limit
1910-1920	10 MHz	1 watt
1920-1925	100 kHz	20 milliwatts
1925-1930	1.25 MHz	100 milliwatts

Additional specific technical requirements were proposed to further minimize interference, both PCS to microwave and PCS to PCS, and promote more efficient use of the available spectrum. These proposals addressed items such as "listen before talk," adaptive power control, requiring use of digital modulation, maximum power spectral density and spectral efficiency requirements, etc. Comments were also requested on the desirability of establishing an industry committee to develop detailed standards for unlicensed devices and also to serve as a focus point for negotiating relocation agreements with the existing Part 94 licensees within any spectrum set aside for unlicensed PCS operations.

179. The commenting parties generally support the Commission's objective of formulating technical specifications that minimize interference to existing users while providing maximum flexibility for technological design. The majority of commenting parties, however, oppose the proposed channelization plan and power limits. UTC, Edison Electric and Bell Atlantic, for example, state the proposed power limits will not protect adequately the existing fixed microwave users. Several parties

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adjacent market gives its written consent.

present alternative channelization schemes. These plans range from a single band with no channelization to complex schemes providing multiple sub-bands and channel bandwidth with channel overlays.

180. Apple, in its comments, urges the Commission to allow an industry committee to develop detailed technical requirements for unlicensed PCS. WINForum, an industry alliance that represents 33 leading information technology companies, proposed a "spectrum etiquette" that provides for equal access and sharing of the available spectrum for all users. The etiquette divides the unlicensed spectrum into two equal sub-bands, one for time critical transmissions or isochronous (voice) transmissions and one for time independent transmissions or asynchronous (high speed data) transmissions. Each sub-band has its own unique etiquette which is a combination of channelization, power, transmission time limits, and channel access parameters.

181. The Commission invited comments on the WINForum etiquette. Most respondents, such as Motorola, AT&T, Northern Telecom, IEEE Project 802 and others, support the WINForum etiquette. Several parties requested changes in various technical aspects of the etiquette. Ericsson raises several concerns with the WINForum etiquette. Ericsson argues that the WINForum etiquette would preclude the use of certain wideband voice technologies and does not adequately define interference parameters between the two sub-bands. Ericsson presents an alternative etiquette that shares many common specifications with the WINForum etiquette. It differs, however, in that it does not include an asynchronous sub-band. Rather, Ericsson's approach would permit operation over several channels to accommodate high data rate transmissions.

182. BellSouth, Tadiran and InterDigital state that the FCC should not impose any channelization as called for in WINForum's isochronous etiquette. They state that to do so would unnecessarily limit the development of services to be offered. Omnipoint argues that the etiquette, which limits signals to 1.25 MHz sub-bands in the isochronous band, should be modified to permit signals up to 5 MHz in bandwidth to accommodate CDMA technology. Other parties state generally that they were not afforded an opportunity to have their views considered by WINForum and suggest that the etiquette should be submitted to a recognized standards body. Some commenters, such as Telocator, PCS Action, Southwestern Bell and Rockwell International Corporation, express concern that the WINForum etiquette may impede interoperability with licensed PCS devices because the etiquette does not provide for isochronous systems requiring more than 1.25 MHz bandwidth.

183. We believe that a "spectrum etiquette" is necessary to facilitate efficient use of the unlicensed PCS spectrum and minimize in-band and out-of-band interference. Further, we find that the WINForum etiquette, with some modifications, strikes an appropriate balance among the various factors that must be taken into account. The WINForum etiquette permits all users to have equal access to the available spectrum on a shared basis. The etiquette also ensures efficient use of the spectrum through use of such techniques as listen-before-talk and power reduction in high-use environments. The WINForum etiquette is fair to both voice and data PCS interests because it divides the available spectrum in half and applies a separate set of rules for each. This approach permits the existing voice and data network manufacturers and service providers in their respective industries to merge their existing technology. This eliminates a potential impediment to the rapid introduction of data PCS devices by avoiding the need to develop additional interfaces. In contrast, we note that Ericsson's proposal for a single isochronous format with a periodic transmission requirement is not generally used by the high speed data community which implements an asynchronous for networking computer systems.

184. We believe it would be counterproductive to submit the WINForum etiquette to a recognized standards body for further review. We observe that the WINForum etiquette was developed on a consensus basis with broad-based industry participation. Further, the Commission has afforded all interested parties an opportunity to offer comments on the WINForum etiquette. The comments overwhelmingly favor the WINForum etiquette. We have taken into account the various modifications and adjustments suggested by the commenters, as discussed below. We are convinced that an etiquette developed by a standards body would ultimately contain many of the trade-offs and compromises that were a part of the WINForum process. We conclude that submittal of the etiquette to a standards body would result in unnecessary delays in introduction of unlicensed PCS to the public with no countervailing benefit. With regard to interoperability of unlicensed PCS devices with equipment that may be designed for the licensed spectrum, we note that the etiquette does not in and of itself preclude this possibility.

185. We find that a number of adjustments to the WINForum etiquette are necessary to further improve spectrum efficiency, add greater flexibility, and take into account the amount of spectrum allocated for unlicensed PCS. We are dedicating the 1900-1920 MHz spectrum for asynchronous operation and the 1890-1900 MHz and 1920-1930 MHz spectrum for isochronous operation. Thus, both voice and data PCS devices will have an even share of the lightly loaded spectrum at 1910-1930 MHz. Further, this arrangement provides a continuous 20 MHz of spectrum to better accommodate the broadband signals expected to be typical of data PCS devices. In response to the concerns of

the commenters, we are providing additional flexibility in the 1890-1900 MHz isochronous band by permitting up to four 1.25 MHz channels to be grouped together to accommodate at least two systems with bandwidths up to 5 MHz. This action will facilitate the use of broadband technologies in at least a portion of the isochronous spectrum. We are also adopting somewhat more strict emission mask requirements to reduce adjacent channel interference and thereby improve spectrum sharing and efficiency.

186. We are implementing the etiquette by including it in the Part 15 technical standards for unlicensed PCS. Compliance with the requirements of the spectrum etiquette will be ensured by requiring certification for equipment that operates in the unlicensed band following the procedures in Subpart J of Part 2 of the Rules. Measurements to demonstrate compliance with the technical standards must be made in accordance with the general measurement guidance provided in Part 15 and good engineering practice. If appropriate, the Commission may consider specific measurement procedures at a later time.

F. RF Hazard Requirements

187. In our Notice we discussed the issue of human exposure to radiofrequency (RF) energy emitted by PCS devices and facilities and whether such emissions might constitute a potential health concern. Subsequently, on March 11, 1993, we adopted a Notice of Proposed Rule Making to amend and update the Commission's guidelines for evaluating environmental RF energy emitted by FCC-regulated transmitters.[131] The guidelines that we proposed to begin using are those developed by the Institute of Electrical and Electronics Engineers, Inc. (IEEE) that have been designated IEEE C95.1-1991. These guidelines have also been adopted by the American National Standards Institute (ANSI) as an American National Standard.[132]

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[131] See Notice of Proposed Rule Making, ET Docket No. 93-62, 8 FCC Rcd 2849 (1993). See also, Order Extending Time for Comments and Reply Comments, ET Docket No. 93-62, 8 FCC Rcd 5528 (1993).

[132] See IEEE C95.1-1991, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz," approved September 26, 1991 by IEEE, published April 27, 1992 by IEEE. Also adopted by ANSI November 18, 1992 (ANSI/IEEE C95.1-1992). To purchase copies from the IEEE, telephone: (800) 678-IEEE. To purchase copies from ANSI, telephone: (212) 642-4900.

188. The new IEEE/ANSI guidelines differ in several significant ways from those they replace, ANSI C95.1-1982.[133] For example, with respect to maximum permissible exposure limitations two tiers are recommended depending on the "environment" in which the exposure occurs.[134] The new guidelines also incorporate generally stricter criteria for hand-carried consumer devices that operate in the 450 MHz to 1.5 GHz range than the criteria recommended by the previous guidelines.[135]

189. The Commission's record concerning this issue predates our March 1993 Notice. In our earlier First Report and Order in this docket we discussed the application of the new guidelines to narrowband PCS.[136] Several respondents in this proceeding have addressed the RF exposure issue in their comments, and many of them referred to the new IEEE/ANSI exposure guidelines. As previously noted in the narrowband item, the major points made by the respondents are as follows.

190. API suggested that the Commission obtain further data concerning this issue, including test data, and that the Commission should not authorize hand-held devices that do not meet the current guidelines. CTP noted that its units operate in the milliwatt range, and it urged the Commission to encourage the use of devices that operate with low RF emission levels. Ericsson stated that it had no information to suggest a demonstrated danger from RF energy emitted by higher frequency digital transmissions. Nevertheless, Ericsson recommended that only low power PCS systems be authorized to reduce potential health concerns over RF exposure. Motorola expressed the opinion that the permissible power levels associated with PCS systems should be based on the IEEE/ANSI criteria for "uncontrolled" environments. In addition, Motorola suggested that there should be no output power limits for base stations except where there is the possibility that people could come close to the base station antenna. In such cases, Motorola suggested that base station power be limited to that of mobile transmitters.

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[133] The Commission has previously adopted the ANSI C95.1-1982 guidelines for use in evaluating the environmental significance of RF radiation produced by FCC-regulated transmitters. See 47 C.F.R. § 1.1307(b).

[134] See IEEE C95.1-1991, definitions of "controlled" and "uncontrolled" environments.

[135] See IEEE C95.1-1991, Section 4.2.

[136] See First Report and Order, supra note 1 at paras. 52-54.

191. Given the importance of this health issue, the interest in facilitating the development of PCS systems, and the fact that general manufacturing of wideband PCS has not yet begun, the Commission believes that it is in the public interest to require licensees and equipment used in this service to comply with the provisions of the IEEE C95.1-1991 guidelines, pending completion of ET Docket No. 93-62.[137] Procedures for calculating minimum separation distance for base station antennas and compliance for hand-held transmitters are discussed in Appendix E.

192. For the purpose of type acceptance of PCS equipment we will require that all hand-held PCS devices comply with the IEEE/ANSI criteria for "uncontrolled" environments. In that regard the Commission recognizes that the radiated power "exclusions" contained in the IEEE/ANSI criteria for hand-held devices only apply to transmitters operating at frequencies up to 1500 MHz.[138] Therefore, the Commission has written to the IEEE to request a formal interpretation as to whether the formula used to determine the power exclusion can be extrapolated to 2200 MHz.[139] Such an extrapolation could make compliance with the ANSI/IEEE criteria less burdensome for manufacturers. In the meantime, compliance with the guidelines can be demonstrated by determination of maximum specific absorption rates (SAR) associated with specific hand-held devices.[140]

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[137] Any rules adopted in this proceeding that do not conform with the final rules adopted later in ET Docket No. 93-62 will be modified accordingly.

[138] See Notice of Proposed Rule Making, ET Docket No. 93-62, supra note 131, at paras. 14-18.

[139] Letter from Thomas P. Stanley, Chief Engineer, Federal Communications Commission, to Andrew G. Salem, Secretary, IEEE Standards Board, dated June 2, 1993.

[140] Determination of SAR can be accomplished by appropriate laboratory and analytic procedures. Quantitative determination of SAR and other measurement procedures are discussed in IEEE C95.3-1991 (also designated as ANSI/IEEE C95.3-1992), "Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields - RF and Microwave." Copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc. Copies can be order from the IEEE, (800) 678-IEEE or from ANSI, (212) 642-4900. Section 5.5 of this publication concerns procedures for measuring internal electromagnetic fields and SAR induced by RF emitters.

G. International Issues

193. In the Notice, we reviewed other countries' efforts to develop mobile personal communications systems similar to those proposed in the U.S. We suggested that the communications networks of the future will be an amalgamation of existing and developing technologies delivering information to a global clientele. Although the Notice was addressing only domestic PCS implementation, we observed that a fully-developed mobile personal communications system (i.e., world-wide PCS) will require on-going multi-national coordination on a variety of issues, including spectrum allocation, technical standards, and regulatory treatment. We tentatively concluded that we should act expeditiously to license U.S. PCS providers.[141]

194. The comments to our Notice clearly indicate the importance of the decision we are taking to U.S. industry and to global communications in general. They also indicate that products being developed for PCS are likely to develop an international market. APC, Anchorage Telephone Utility, Metrocall, Motorola, and the NTIA agree that we must complete this proceeding expeditiously so that our PCS industry can begin to develop and compete globally. APC states that "PCS provides our country with its best near-term chance to grow an entirely new sector of the economy, to generate new, high-quality jobs, and to export American equipment and expertise to the world."

195. Several commenters also stress the need for us to consider what is transpiring elsewhere in the world in making our decisions in this proceeding. For example, Knowledge Implementation indicated that it would be highly desirable to coordinate U.S. frequency allocations with those of Europe in order to ensure a larger market for U.S.-manufactured devices. Similarly, Ericsson, Pacific Communications Sciences, and Corporate Technology Partners ask that our decisions in this proceeding not preclude the use of technology that is already beginning to be used elsewhere in the world. GTE indicates that interoperability is important for compatibility with our North American neighbors. NYNEX comments that the true promise of PCS is the establishment of world-wide personal mobile communications, which can be fulfilled by multi-national coordination and standards.

196. In adopting this Report and Order, we are taking what we consider to be significant steps to promote U.S. technology. We recognize that the efforts of the European Community (EC) and individual countries to implement PCS-like services in the same

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[141] We note, however, that PCS operations in the border regions may require consultations or arrangements with neighboring countries.

general 2 GHz bands continue. For example, EC countries are beginning to implement PCS systems such as DECT and DSC-1800.[142] Japan is also developing Personal Handy Phone (PHP) standards.[143] These services are all intended to compete in the global marketplace for PCS, and we consider it essential that U.S. manufacturers and service providers also be able to compete in that market as soon as possible. In addition, the flexibility provided by the rules we are adopting should facilitate the development of PCS products that can be used in other parts of the world.

197. We recognize that, in making this decision, many issues on world-wide PCS are unresolved. The U.S. and many other countries, through the International Telecommunication Union, are continuing their efforts to develop standards for Future Public Land Mobile Telecommunications Systems (FPLMTS). WARC-92 identified essentially the same spectrum we are allocating to PCS today for use for FPLMTS on a world-wide basis.[144] This could allow world-wide roaming using the same hand-held radio, communicating with the telecommunications network via either terrestrial or satellite base stations. While many aspects of FPLMTS sound promising, FPLMTS is not intended to be deployed until the year 2000 at the earliest. Our PCS needs, and those throughout the world, mandate that we allow PCS to begin now. The U.S., both government and industry, has participated in the FPLMTS activities and we intend to continue in such efforts that may ultimately lead to world-wide PCS.

H. Satellite Issues

198. In the Notice, we expressed our intent not to preclude future offerings of satellite-based PCS from the mix of developing technologies that could deliver personal communication services. We requested comments on the prospects for future

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[142] In addition to the services offered by CT-2, DECT provides data transmission and ISDN connection in a high density traffic environment. DCS-1800 is an extension of GSM Global System for Mobile Communications) the pan-European digital standard for cellular radio communications. The cells for DCS-1800 are smaller than those for GSM due to different propagation characteristics.

[143] See L. Haller and K. Wimmer, "International Implementation of PCS and Other Wireless Communications Services" (released at Federal Communications Bar Association/ABA Science and Technology Section Seminar, Washington, D.C., June 8, 1993) (to be published in the FCBA International Practice Handbook).

[144] See note 5 supra.

satellite-based offerings for both domestic and international services, and on how satellite-based services could be integrated into the technical and regulatory rules proposed in this proceeding.

199. Comments on satellite-based PCS were filed by APC, Calcell Wireless Inc., PCN America, Motorola, Celsat, AMSC and Communications Satellite Corporation. All of these commenters requested that the 1970-1990 MHz band which is allocated internationally to the mobile satellite service, be reserved for future domestic PCS satellite operations. While none of these parties make specific proposals for future satellite services, all of these commenters agreed that satellite-based PCS and hybrid PCS systems that interconnect satellite and terrestrial PCS operations will provide a valuable component to PCS systems in the domestic and international communications market. We note that Celsat has proposed a hybrid PCS system that includes satellite-based PCS in its amendment to petition for rule making in RM-7927.[145]

200. The allocation plan that we are adopting in this Report and Order leaves allocated to emerging technologies the 1970-1990 and 2160-2180 MHz bands that could be used for PCS satellite operations. We will address satellite-based PCS, including possibilities for hybrid satellite and terrestrial systems, in the future.

IV. PROCEDURAL INFORMATION

201. Regulatory Flexibility Analysis. The analysis pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, is contained in Appendix B.

202. Ordering Clauses. Accordingly, IT IS ORDERED, that UTAM, Inc. is designated to coordinate and manage the transition of the 1890-1930 MHz band from the Private Operational Fixed Microwave Service to unlicensed PCS operations, conditioned upon its submittal and the Commission's acceptance of an funding plan; and a plan for "band clearing" that will permit implementation of noncoordinatable (nomadic) devices, particularly noncoordinatable data PCS devices.

203. Further, IT IS ORDERED, that the "Emergency Petition" filed by Apple Computer, Inc. is accepted and will be treated as a petition for reconsideration in this proceeding.

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[145] See note 63, supra. In addition, Resolution 212 (WARC-92) notes that the CCIR has recognized that space techniques are an integral part of FPLMTS.

204. Further, IT IS ORDERED, that Parts 2, 22, and 99 of the Commission's Rules ARE AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register;[146] and that Part 15 of the Commission's Rules IS AMENDED as specified in Appendix A, effective 60 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[146] Part 99 is reorganized to include provisions that govern 2 GHz PCS. The provisions related to 900 MHz PCS are reorganized without substantive change.

Appendix A: Final Rules

I. Part 2 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 -- FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r) and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended as follows:

a. Columns (1), (2), and (3) in the 1670-2290 MHz bands; column (4) in the 2110-2200 MHz band; and columns (5) and (6) in the 1850-1990, 2110-2150, and 2160-2200 MHz bands are revised as follows:

* * * * * * * *

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)

* * * * * * * *

1670-1675	METEOROLOGICAL AIDS. FIXED. METEOROLOGICAL-SATELLITE (space-to-Earth). MOBILE 740A. 722		* * * * *
1675-1690 METEOROLOGICAL AIDS. FIXED. METEOROLOGICAL-SATELLITE (space-to-Earth). MOBILE except aeronautical mobile. 722	1675-1690 METEOROLOGICAL AIDS. FIXED. METEOROLOGICAL-SATELLITE (space-to-Earth). MOBILE except aeronautical mobile. MOBILE-SATELLITE (Earth-to-space). 722 735A	1675-1690 METEOROLOGICAL AIDS. FIXED. METEOROLOGICAL-SATELLITE (space-to-Earth). MOBILE except aeronautical mobile. 722	
1690-1700 METEOROLOGICAL AIDS. METEOROLOGICAL-SATELLITE (space-to-Earth). Fixed. Mobile except aeronautical mobile. 671 722 741	1690-1700 METEOROLOGICAL AIDS. METEOROLOGICAL-SATELLITE (space-to-Earth). MOBILE-SATELLITE (Earth-to-space). 671 722 735A 740	1690-1700 METEOROLOGICAL AIDS. METEOROLOGICAL-SATELLITE (space-to-Earth). 671 722 740 742	
1700-1710 FIXED. METEOROLOGICAL-SATELLITE (space-to-Earth). MOBILE except aeronautical mobile. 671 722	1700-1710 FIXED. METEOROLOGICAL-SATELLITE (space-to-Earth). MOBILE except aeronautical mobile. MOBILE-SATELLITE (Earth-to-space). 671 722 735A	1700-1710 FIXED. METEOROLOGICAL-SATELLITE (space-to-Earth). MOBILE except aeronautical mobile. 671 722 743	

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1710-1930	FIXED. MOBILE 740A. 722 744 745 746 746A		* * * * *			
1930-1970 FIXED. MOBILE. 746A	1930-1970 FIXED. MOBILE. Mobile-Satellite (Earth-to-space). 746A	1930-1970 FIXED. MOBILE. 746A	1850-1990	1850-1990 FIXED. MOBILE. US331 NG153	PERSONAL COMMUNICATIONS SERVICES (99). PRIVATE OPERATIONAL-FIXED MICROWAVE (94). RADIO FREQUENCY DEVICES (15).	EMERGING TECHNOLOGIES
1970-1980 FIXED. MOBILE. 746A	1970-1980 FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space). 746A 746B 746C	1970-1980 FIXED. MOBILE. 746A	1990-2110	1990-2110 FIXED. MOBILE. US90 US111 US219 US222 NG23 NG118	AUXILIARY BROADCAST (74). CABLE TELEVISION (78).	
1980-2010	FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space). 746A 746B 746C					
2010-2025	FIXED. MOBILE. 746A					
2025-2110	FIXED. MOBILE 747A. SPACE RESEARCH (Earth-to-space) (space-to-space). SPACE OPERATION (Earth-to-space) (space-to-space). EARTH EXPLORATION-SATELLITE (Earth-to-space) (space-to-space). 750A					

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2110-2120	FIXED. MOBILE. SPACE RESEARCH (deep space)(Earth-to-space). 746A		2110-2200	2110-2150 FIXED. MOBILE.	DOMESTIC PUBLIC FIXED (21). PERSONAL COMMUNICATIONS SERVICES (99). PRIVATE OPERATIONAL-FIXED MICROWAVE (94). PUBLIC MOBILE (22).	EMERGING TECHNOLOGIES
2120-2160 FIXED. MOBILE.	2120-2160 FIXED. MOBILE. Mobile-Satellite (space-to-Earth).	2120-2160 FIXED. MOBILE.		US111 US252 US331 NG23 NG153		
746A	746A	746A		2150-2160 FIXED. NG23	MULTIPOINT DISTRIBUTION (21). PRIVATE OPERATIONAL-FIXED MICROWAVE (94).	
2160-2170 FIXED. MOBILE.	2160-2170 FIXED. MOBILE. MOBILE-SATELLITE (space-to-Earth).	2160-2170 FIXED. MOBILE.		2160-2200 FIXED. MOBILE.	DOMESTIC PUBLIC FIXED (21). PERSONAL COMMUNICATIONS SERVICES (99). PRIVATE OPERATIONAL-FIXED MICROWAVE (94). PUBLIC MOBILE (22).	EMERGING TECHNOLOGIES
746A	746A 746B 746C	746A				
2170-2200	FIXED. MOBILE. MOBILE-SATELLITE (space-to-Earth). 746A 746B 746C		US111 US252 US331	US331 NG23 NG153		
2200-2290	FIXED. SPACE RESEARCH (space-to-Earth) (space-to-space). SPACE OPERATION (space-to-Earth) (space-to-space). EARTH EXPLORATION-SATELLITE (space-to-Earth) (space-to-space). MOBILE 747A. 750A		* * * * *			

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b. Remove the text of existing footnotes 747, 748, 749, and 750 from the international footnotes; and add the text of new footnotes 735A, 740A, 746A, 746B, 746C, 747A, and 750A to the international footnotes:

INTERNATIONAL FOOTNOTES

* * * * *

735A In the band 1675-1710 MHz, stations in the mobile-satellite service shall not cause harmful interference to, nor constrain the development of, the meteorological-satellite and meteorological aids services (see Resolution 213 (WARC-92)) and the use of this band shall be subject to the provisions of Resolution 46 (WARC-92).

* * * * *

740A The bands 1670-1675 MHz and 1800-1805 MHz are intended for use, on a worldwide basis, by administrations wishing to implement aeronautical public correspondence. The use of the band 1670-1675 MHz by stations in the systems for public correspondence with aircraft is limited to transmissions from aeronautical stations and the use of the band 1800-1805 MHz is limited to transmissions from aircraft stations.

* * * * *

746A The frequency bands 1885-2025 MHz and 2110-2200 MHz are intended for use, on a worldwide basis, by administrations wishing to implement the future public land mobile telecommunication systems (FPLMTS). Such use does not preclude the use of these bands by other services to which these bands are allocated. The frequency bands should be made available for FPLMTS in accordance with Resolution 212 (WARC-92).

746B The use of the bands 1970-2010 MHz and 2160-2200 MHz by the mobile-satellite service shall not commence before 1 January 2005 and is subject to the application of the coordination and notification procedures set forth in Resolution 46 (WARC-92). In the band 2160-2200 MHz coordination of space stations of the mobile-satellite service with respect to terrestrial services is required only if the power flux-density produced at the Earth's surface exceeds the limits in No. 2566. In respect of assignments operating in this band, the provisions of Section II, paragraph 2.2 of Resolution 46 (WARC-92) shall also be applied to geostationary transmitting space stations with respect to terrestrial stations.

746C In the United States of America, the use of the bands 1970-2010 MHz and 2160-2200 MHz by the mobile-satellite service shall not commence before 1 January 1996.

747 Removed.

747A In making assignments to the mobile service in the bands 2025-2110 MHz and 2200-2290 MHz, administrations shall take into account Resolution 211 (WARC-92).

748 Removed.

749 Removed.

750 Removed.

750A Administrations are urged to take all practical measures to ensure that space-to-space transmissions between two or more non-geostationary satellites, in the space research, space operations and Earth exploration-satellite services in the bands 2025-2110 MHz and 2200-2290 MHz, shall not impose any constraints on Earth-to-space, space-to-Earth and other space-to-space transmissions of those services and in those bands between geostationary and non-geostationary satellites.

* * * * *

c. Add the text of new footnote US331 to the United States footnotes:

UNITED STATES (US) FOOTNOTES

* * * * *

US331 In the frequency bands 1850-1970 MHz, 2130-2150 MHz, and 2180-2200 MHz, the only fixed PCS services permitted are ancillary services used in support of mobile personal communications services.

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d. Revise the text of footnote NG153 to the Non-Government footnotes to read as follows:

NON-GOVERNMENT (NG) FOOTNOTES

* * * * *

NG153 The 1970-1990 MHz, 2110-2130 MHz, and 2160-2180 MHz bands are reserved for future emerging technologies on a co-primary basis with the fixed and mobile services. Allocations to specific services will be made in future proceedings.

* * * * *

II. Part 15 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation continues to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. Subpart D is added to read as follows:

Part 15 -- RADIO FREQUENCY DEVICES

* * * * *

Subpart D -- Unlicensed Personal Communications Service Devices

15.301 Scope.
15.303 Definitions.
15.305 Equipment authorization requirement.
15.307 Coordination with fixed microwave service.
15.309 Cross reference.
15.311 Labelling requirements.
15.313 Measurement procedures.
15.315 Conducted limits.
15.317 Antenna requirement.
15.319 General technical requirements.
15.321 Specific requirements for isochronous devices operating in the 1890-1900 and 1920-1930 MHz sub-bands.
15.323 Specific requirements for asynchronous operation in the 1900-1920 MHz sub-band.

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Subpart D -- Unlicensed Personal Communications Service Devices

§ 15.301 Scope.

This subpart sets out the regulations for unlicensed personal communications service (PCS) devices operating in the 1890-1930 MHz frequency band.

§ 15.303 Definitions.

(a) *Asynchronous devices.* Devices that transmit RF energy at irregular time intervals, as typified by local area network data systems.

(b) *Coordinatable PCS device.* PCS devices whose geographical area of operation is sufficiently controlled either by necessity of operation with a fixed infrastructure or by disabling mechanisms to allow adequate coordination of their locations relative to incumbent fixed microwave facilities.

(c) *Emission bandwidth*. For purposes of this subpart the emission bandwidth shall be determined by measuring the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, that are 26 dB down relative to the maximum level of the modulated carrier. Compliance with the emissions limits is based on the use of measurement instrumentation employing a peak detector function with an instrument resolutions bandwidth approximately equal to 1.0 percent of the emission bandwidth of the device under measurement.

(d) *Isochronous devices*. Devices that transmit at a regular interval, typified by time-division voice systems.

(e) *Noncoordinatable PCS device*. A PCS device that is capable of randomly roaming and operating in geographic areas containing incumbent microwave facilities such that operation of the PCS device will potentially cause harmful interference to the incumbent microwave facilities.

(f) *Peak transmit power*. The peak power output as measured over an interval of time equal to the frame rate or transmission burst of the device under all conditions of modulation. Usually this parameter is measured as a conducted emission by direct connection of a calibrated test instrument to the equipment under test. If the device cannot be connected directly, alternative techniques acceptable to the Commission may be used.

(g) *Personal Communications Service (PCS) Devices [Unlicensed]*. Intentional radiators operating in the frequency band 1890-1930 MHz that provide a wide array of mobile and ancillary fixed communication services to individuals and businesses.

(h) *Spectrum window*. An amount of spectrum equal to the intended emission bandwidth in which operation is desired.

(i) *Sub-band*. For purposes of this subpart the term sub-band refers to the spectrum allocated for isochronous or asynchronous transmission.

(j) *Thermal noise power*. The noise power in watts defined by the formula N=kTf where N is the noise power in watts, k is Boltzmann's constant, T is the absolute temperature in degrees Kelvin (e.g., 295° K) and f is the emission bandwidth of the device in hertz.

(k) *Time window*. An interval of time in which transmission is desired.

§ 15.305 Equipment authorization requirement.

PCS devices operating under this subpart shall be certificated by the Commission under the procedures in Subpart J of Part 2 of this Chapter before marketing. The application for certification must contain sufficient information to demonstrate compliance with the requirements of this subpart.

§ 15.307 Coordination with fixed microwave service.

(a) UTAM, Inc., is designated to coordinate and manage the transition of the 1890-1930 MHz band from Private Operational-Fixed Microwave Service (OFS) operating under Part 94 of this Chapter to unlicensed PCS operations, conditioned upon the submittal and acceptance by the Commission of:

(1) A funding plan that is equitable to all prospective manufacturers of unlicensed PCS devices, and

(2) A plan for "band clearing" that will permit the implementation of noncoordinatable (nomadic) devices and, in particular, noncoordinatable data PCS devices, as promptly as possible. The responsibilities of UTAM, Inc., include, but are not limited to, relocation of existing OFS microwave stations pursuant to requirements established in ET Docket No. 92-9, negotiating costs of relocation, ensuring that comparable facilities are provided, and resolving any disputes of interference to OFS microwave operations from unlicensed PCS operations. These responsibilities shall terminate upon a determination by the Commission that interference to OFS microwave operations from unlicensed PCS operations is no longer a concern.

(b) Each application for certification of equipment operating under the provisions of this Subpart must be accompanied by an affidavit from UTAM, Inc. certifying that the applicant is a participating member of UTAM, Inc. In the event a grantee fails to fulfill the obligations attendant to participation in UTAM, Inc., the Commission may invoke administrative sanctions as necessary to preclude continued marketing and installation of devices covered by the grant of certification, including but not limited to revoking certification.

(c) An application for certification of a PCS device that is deemed by UTAM, Inc. to be noncoordinatable will not be accepted until the Commission announces that a need for coordination no longer exists.

(d) A coordinatable PCS device is required to incorporate measures to assure that it cannot be activated until installation at its authorized location is verified by UTAM, Inc.

(e) A coordinatable PCS device shall incorporate an automatic mechanism for disabling operation in the event it is moved outside the geographic area where its operation has been coordinated by UTAM, Inc. The application for certification shall contain a full explanation of the operation of the disabling mechanism and must satisfy the Commission that this mechanism cannot be easily defeated.

(f) At such time as the Commission deems that the need for coordination between unlicensed PCS operations and existing Part 94 Private Operational-Fixed Microwave Services ceases to exist, the disabling mechanism required by paragraph (e) of this section will no longer be required.

(g) Operations under the provisions of this subpart are required to protect systems in the Private Operational-Fixed Microwave Service operating within the 1850-1990 MHz band until the dates and conditions specified in Section 94.59 of this Chapter for termination of primary status. Interference protection is not required for Part 94 stations in this band licensed on a secondary basis.

(h) The operator of a PCS device that is relocated from the coordinated area specified by UTAM, Inc., must cease operating the device until coordination for the new location is verified by UTAM, Inc.

§ 15.309 Cross reference.

(a) The provisions of Subpart A of this Part apply to unlicensed PCS devices, except where specific provisions are contained in Subpart D.

(b) The requirements of Subpart D apply only to the radio transmitter contained in the PCS device. Other aspects of the operation of a PCS device may be subject to requirements contained elsewhere in this Chapter. In particular, a PCS device that includes digital circuitry not directly associated with the radio transmitter also is subject to the requirements for unintentional radiators in Subpart B.

§ 15.311 Labelling requirements.

In addition to the labelling requirements of Section 15.19(a)(3), all devices authorized under this subpart must bear a prominently located label with the following statement:

> Installation of this equipment is subject to notification and coordination with UTAM, Inc.

§ 15.313 Measurement procedures.

Measurements must be made in accordance with Subpart A, except where specific procedures are specified in Subpart D. If no guidance is provided, the measurement procedure must be in accordance with good engineering practice.

§ 15.315 Conducted limits.

An unlicensed PCS device that is designed to be connected to the public utility (AC) power line must meet the limits specified in Section 15.207.

§ 15.317 Antenna requirement.

An unlicensed PCS device must meet the antenna requirement of Section 15.203.

§ 15.319 General technical requirements.

(a) The 1890-1900 and 1920-1930 MHz sub-bands are limited to use by isochronous devices under the requirements of Section 15.321. The 1900-1920 MHz sub-band is limited to use by asynchronous devices under the requirements of Section 15.323.

(b) All transmissions must use only digital modulation techniques.

(c) Peak transmit power shall not exceed 100 microwatts multiplied by the square root of the emission bandwidth in hertz. Peak transmit power must be measured over any interval of continuous transmission using instrumentation calibrated in terms of an rms-equivalent voltage. The measurement results shall be properly adjusted for any instrument limitations, such as detector response times, limited resolution bandwidth capability when compared to the emission bandwidth, sensitivity, etc., so as to obtain a true peak measurement for the emission in question over the full bandwidth of the channel.

(d) Power spectral density shall not exceed 3 milliwatts in any 3 kHz bandwidth as measured with a spectrum analyzer having a resolution bandwidth of 3 kHz.

(e) The peak transmit power shall be reduced by the amount in decibels that the maximum directional gain of the antenna exceeds 3 dBi.

(f) The device shall automatically discontinue transmission in case of either absence of information to transmit or operational failure. These provisions are not intended to preclude transmission of control and signaling information or use of repetitive codes used by certain digital technologies to complete frame or burst intervals.

(g) Notwithstanding other technical requirements specified in this subpart, attenuation of emissions below the general emission limits in Section 15.209 is not required.

(h) Where there is a transition between limits, the tighter limit shall apply at the transition point.

(i) The device must comply with IEEE C95.1-1991, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz." Measurement methods are specified in IEEE C95.3-1991, "Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields - RF and Microwave." All equipment shall be considered to operate in an "uncontrolled" environment. The application for certification must contain a statement confirming compliance with IEEE C95.1-1991. Technical information showing the basis for this statement must be submitted to the Commission upon request.

§ 15.321 Specific requirements for Isochronous devices operating in the 1890-1900 and 1920-1930 MHz sub-bands.

(a) Operation shall be contained within one of two channels starting with 1890-1895 MHz and ending with 1895-1900 MHz, or within one of eight channels that are 1.25 MHz in width starting

with 1920-1921.25 MHz and ending with 1928.75-1930 MHz. Further sub-division of a 1.25 or 5 MHz channel is permitted with a reduced power level, as specified in Section 15.319(c), but in no event shall the emission bandwidth be less than 50 kHz.

(b) Intentional radiators with an intended emission bandwidth less than 625 kHz shall start searching for an available time and spectrum window at 1890 or 1920 MHz and search upward from that point. Devices with an intended emission bandwidth greater than 625 kHz shall start searching for an available time and spectrum window at 1930 or 1900 MHz and search downward from that point.

(c) Isochronous devices must incorporate a mechanism for monitoring the time and spectrum windows that its transmission is intended to occupy. The following criteria must be met:

(1) Before initiating transmission, devices must monitor the time and spectrum windows they intend to use for a period of at least 10 milliseconds to determine if the access criteria is met.

(2) The monitoring threshold must not be more than 30 dB above the thermal noise power for a bandwidth equivalent to the emission bandwidth used by the device.

(3) If no signal above the threshold level is detected, transmission may commence and continue with the same emission bandwidth in the monitored time and spectrum windows without further monitoring. However, occupation of the same combined time and spectrum windows by a device or group of cooperating devices continuously over a period of time longer than 8 hours is not permitted without repeating the access criteria.

(4) Once access to specific combined time and spectrum windows is obtained an acknowledgement from a system participant must be received by the initiating transmitter within one second or transmission must cease.

(5) If access to spectrum is not available as determined by the above, and a minimum of 40 duplex system access channels are defined for the system, the time and spectrum windows with the lowest power level below a monitoring threshold of 50 dB above the thermal noise power determined for the emission bandwidth may be accessed. A device utilizing the provisions of this paragraph must have monitored all access channels defined for its system within the last 10 seconds and must verify within the 20 milliseconds immediately preceding actual channel access that the detected power of the selected time and spectrum windows is no higher than the previously detected value. The power measurement resolution for this comparison must be accurate to within 6 dB. No device or group of cooperating devices located within 1 meter of each other shall occupy more than three 1.25 MHz channels, two 1.25 MHz channels and one 5 MHz channel, or two 5 MHz channels during any 10 millisecond period of time.

(6) If the selected combined time and spectrum windows are unavailable, the device may either monitor and select a different window or seek to use the same windows after waiting an amount of time randomly chosen from a uniform random distribution between 10 and 150 milliseconds.

(7) The monitoring system bandwidth must be equal to or greater than the emission bandwidth of the intended transmission and have a maximum reaction time less than 50xSQRT(1.25/emission bandwidth in MHz) microseconds for signals at the applicable threshold level but shall not be required to be less than 50 microseconds. If a signal is detected that is 6 dB or more above the applicable threshold level, the maximum reaction time shall be 35xSQRT(1.25/emission bandwidth in MHz) microseconds but shall not be required to be less than 35 microseconds.

(8) The monitoring system shall operate via the transmitting antenna, or an antenna with the same coverage area as the transmitting antenna, and shall be capable of measuring the power level of the monitored signal with an accuracy of ± 3 dB.

(9) Devices that have a power output lower than the maximum permitted under the rules may increase their monitoring detection threshold by one decibel for each one decibel that the transmitter power is below the maximum permitted.

(d) Emissions shall be attenuated below a reference power of 112 milliwatts as follows: 40 dB between the channel edges and 1.25 MHz above or below the channel; 50 dB between 1.25 and 2.5 MHz above or below the channel; and 60 dB at 2.5 MHz or greater above or below the channel. For systems which further sub-divide a 1.25 MHz channel into X sub-channels, the following emission mask shall be followed: in the bands between 1B and 2B measured from the center of the emission bandwidth the total power emitted by the device shall be at least 40 dB below the transmit power permitted for that device; in the bands between 2B and 3B measured from the center of the emission bandwidth the total power emitted by an intentional radiator shall be at least 50 dB below the transmit power permitted for that radiator; in the bands between 3B and the 1.25 MHz channel edge the total power emitted by an intentional radiator in the measurement bandwidth shall be at least 60 dB below the transmit power permitted for that radiator. "B" is defined as the emission bandwidth of the device in hertz. Compliance with the emissions limits is based on the use of measurement instrumentation employing a peak detector function with an instrument resolution bandwidth approximately equal to 1.0 percent of the emission bandwidth of the device under measurement.

(e) The frame period (a set of consecutive time slots in which the position of each time slot can be identified by reference to a synchronizing source) of an intentional radiator operating in these sub-bands shall be 10 milliseconds/X where X is a positive whole number. Each device that implements time division for the purposes of maintaining a duplex connection on a given frequency carrier shall maintain a frame repetition rate with a frequency stability of at least 50 parts per millions (ppm). Each device which further divides access in time in order to support multiple communication links on a given frequency carrier shall maintain a frame repetition rate with a frequency stability of at least 10 ppm. The jitter (time-related, abrupt, spurious variations in the duration of the frame interval) introduced at the two ends of

such a communication link shall not exceed 25 microseconds for any two consecutive transmissions. Transmission shall be continuous during the frame period defined for the device.

(f) The frequency stability of the carrier frequency of the intentional radiator shall be maintained within ± 10 ppm over 1 hour or the interval between channel access monitoring, whichever is shorter. The frequency stability shall be maintained over a temperature variation of -30° to +50° degrees C at normal supply voltage, and over a variation in the primary supply voltage of 85 percent to 115 percent of the rated supply voltage at a temperature of 20° C. For equipment that is only capable of operating from a battery, the frequency stability tests shall be performed using a new battery without any further requirement to vary supply voltage.

§ 15.323 Specific requirements for asynchronous operation in the 1900-1920 MHz sub-band.

(a) Operation shall be contained within one of two 10 MHz channels: 1900-1910 MHz or 1910-1920 MHz. The emission bandwidth of any intentional radiator operating in this sub-band shall be no less than 500 kHz.

(b) All systems of less than 2.5 MHz emission bandwidth shall first occupy spectrum beginning nearest a channel edge, while systems of more than 2.5 MHz emission bandwidth will first occupy the center half of a channel. Devices with an emission bandwidth of less than 1.0 MHz may not occupy the center half of a channel if other spectrum is available.

(c) Asynchronous devices must incorporate a mechanism for monitoring the spectrum that its transmission is intended to occupy. The following criteria must be met:

(1) Before initiating a transmission burst, devices must monitor the spectrum window they intend to use for a period of time that is at least 50 microseconds.

(2) The monitoring threshold must not be more than 32 dB above the thermal noise power for a bandwidth equivalent to the emission bandwidth of the device.

(3) If no signal above the threshold level is detected, a transmission burst may commence in the monitored spectrum window. Once a transmission burst has started, an individual device or a group of cooperating devices is not required to monitor the spectrum window provided the intraburst gap timing requirement specified below is not exceeded.

(4) After completion of a transmission burst, an individual device or cooperating group of devices must cease transmission and wait a deference time randomly chosen from a uniform random distribution ranging from 50 to 750 microseconds after which time an attempt to access the band again may be initiated. For each occasion that an access attempt fails after the initial inter-burst interval, the deference time chosen shall double until an upper limit of 12 milliseconds is reached. The deference time remains at the upper limit until an access attempt

is successful. The deference time is re-initialized after each successful access attempt.

(5) The monitoring system bandwidth must be equal to or greater than the emission bandwidth of the intended transmission and shall have a maximum reaction time less than 50xSQRT(1.25/emission bandwidth in MHz) microseconds for signals at the applicable threshold level but shall not be required to be less than 50 microseconds. If a signal is detected that is 6 dB or more above the threshold level, the maximum reaction time shall be 35xSQRT(1.25/emission bandwidth in MHz) microseconds but shall not be required to be less than 35 microseconds.

(6) The monitoring system shall operate via the transmitting antenna, or an antenna with the same coverage area as the transmitting antenna, and shall be capable of measuring the power level of the monitored signal with an accuracy of ± 3 dB.

(7) Devices that have a power output lower than the maximum permitted under the rules may increase their detection threshold by one decibel for each one decibel that the transmitter power is below the maximum permitted.

(d) Emissions shall be attenuated below a reference power of 112 milliwatts as follows: 40 dB between the channel edges and 1.25 MHz above or below the channel; 50 dB between 1.25 and 2.5 MHz above or below the channel; and 60 dB at 2.5 MHz or greater above or below the channel. Compliance with the emissions limits is based on the use of measurement instrumentation employing a peak detector function with an instrument resolution bandwidth approximately equal to 1.0 percent of the emission bandwidth of the device under measurement.

(e) The frequency stability of the carrier frequency of intentional radiators operating in this sub-band shall be ± 10 ppm over 10 milliseconds or the interval between channel access monitoring, whichever is shorter. The frequency stability shall be maintained over a temperature variation of -30° to $+50^{\circ}$ Celsius at normal supply voltage, and over a variation in the primary supply voltage of 85 percent to 115 percent of the rated supply voltage at a temperature of 20 degrees Celsius. For equipment that is only capable of operating from a battery, the frequency stability tests shall be performed using a new battery without any further requirement to vary supply voltage.

(f) An asynchronous transmission burst is a series of transmissions from one or more transmitters acting cooperatively. The transmission burst duration from one device or group of devices acting cooperatively shall be no greater than 10 milliseconds. Any intraburst gap between cooperating devices shall not exceed 25 microseconds.

(g) Individual unit intraburst transmissions shall be separated by a uniform random-duration interval evenly distributed between 50 and 375 microseconds.

III. Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 22 -- PUBLIC MOBILE SERVICE

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 22.911(b) is revised to read as follows:

§ 22.911 Permissible communications.

* * * * *

(b) Base stations in this service are authorized to communicate with associated subscribers. Base stations must also render service to authorized roamers, if such roamers are using mobile equipment that is technically compatible with the base stations. Service may be rendered to mobile stations on board vessels.

* * * * *

3. In Section 22.930, paragraphs (b), (f), and (g) are removed and reserved. Additionally, the section heading and introductory paragraph are revised to read as follows:

§ 22.930 Alternative technologies and auxiliary services.

Cellular system licensees may employ alternative technologies and may provide auxiliary common carrier services, including personal communications services (as defined in Section 99.5 of this chapter) on their assigned cellular spectrum, provided that interference to other cellular systems is not caused. The only fixed service permitted under this section is basic exchange telecommunications radio service. The provisions of this section are referred to as the cellular service option.

* * * * *

(b) [Reserved.]

* * * * *

(f) [Reserved.]

(g) [Reserved.]

* * * * *

IV. Part 99 of Title 47 of the Code of Federal Regulations is revised to read as follows:

PART 99 -- PERSONAL COMMUNICATIONS SERVICES

Subpart A -- General Information

Sec.

99.1 Basis and purpose.
99.2 Other applicable rule parts.
99.3 Permissible communications.
99.5 Terms and definitions.

Subpart B -- Applications and Licenses

GENERAL FILING REQUIREMENTS

99.10 Scope.
99.11 Initial authorization.
99.12 Eligibility.
99.13 MTAs and BTAs.
99.15 License period.
99.16 Criteria for comparative renewal proceedings.

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99.50 Scope.
99.51 Equipment authorization.
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Subpart D -- Narrowband PCS

99.100 Scope.
99.102 Licensed service areas.
99.103 Construction requirements.
99.130 Frequencies.
99.131 Authorized bandwidth.
99.132 Power and antenna height limits.
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99.134 Co-channel separation criteria.
99.135 Frequency stability.

Subpart E -- Broadband PCS

99.200 Scope.
99.202 Frequencies.
99.204 Cellular eligibility.
99.206 Construction requirements.
99.231 Power and antenna height limits.
99.232 Field strength limits.
99.233 Interference protection.

99.234 Emission limits.
99.235 Frequency stability.

Authority: 47 U.S.C. 154, 303, and 332, unless otherwise noted.

Subpart A -- General Information

§ 99.1 Basis and purpose.

This section contains the statutory basis for this part of the rules and provides the purpose for which this part is issued.

(a) *Basis*. The rules for the personal communications services (PCS) in this part are promulgated under the provisions of the Communications Act of 1934, as amended, that vests authority in the Federal Communications Commission to regulate radio transmission and to issue licenses for radio stations.

(b) *Purpose*. This part states the conditions under which portions of the radio spectrum are made available for PCS.

(c) *Scope*. The rules in this part apply only to stations authorized under this part. Rules in Subparts D and E apply only to stations authorized under those subparts.

§ 99.2 Other applicable rule parts.

Other FCC rule parts applicable to licensees in the personal communications services include the following:

(a) *Part 0*. This part describes the Commission's organization and delegations of authority. Part 0 of this chapter also lists available Commission publications, standards and procedures for access to Commission records, and location of Commission Field Offices.

(b) *Part 1*. This part includes rules of practice and procedure for license applications, adjudicatory proceedings, procedures for reconsideration and review of the Commission's actions; provisions concerning violation notices and forfeiture proceedings; and the environmental requirements that, if applicable, must be complied with prior to the initiation of construction.

(c) *Part 2*. This part contains the Table of Frequency Allocations and special requirements in international regulations, recommendations, agreements, and treaties. This part also contains standards and procedures concerning the marketing and importation of radio frequency devices, and for obtaining equipment authorization.

(d) *Part 5*. This part contains rules prescribing the manner in which parts of the radio frequency spectrum may be made available for experimentation.

(e) *Part 15*. This part contains rules setting out the regulations under which an intentional, unintentional, or incidental radiator may be operated without an individual license. It also contains the technical specifications,

administrative requirements and other conditions relating to the marketing of Part 15 devices. Unlicensed PCS devices operate under Subpart D of Part 15.

(f) *Part 17*. This part contains requirements for construction, marking and lighting of antenna towers.

(g) *Part 21*. This part contains rules concerning point-to-point microwave service authority relating to communications common carriers.

(h) *Part 68*. This part contains technical standards for connection of terminal equipment to the telephone network.

(i) *Part 94*. This part contains rules concerning the private microwave service relating to point-to-point communication requirements.

§ 99.3 Permissible communications.

PCS licensees may provide any mobile communications service on their assigned spectrum. Fixed services may be provided only on an ancillary basis to mobile operations. Broadcasting as defined in the Communications Act is prohibited.

§ 99.5 Terms and definitions.

Assigned Frequency. The center of the frequency band assigned to a station.

Authorized Bandwidth. The maximum width of the band of frequencies permitted to be used by a station. This is normally considered to be the necessary or occupied bandwidth, whichever is greater.

Average Terrain. The average elevation of terrain between 3 and 16 kilometers from the antenna site.

Base Station. A land station in the land mobile service.

Broadband PCS. PCS services operating in the 1850-1890 MHz, 1930-1970 MHz, 2130-2150 MHz, and 2180-2200 MHz bands.

Effective Radiated Power (e.r.p.) (in a given direction). The product of the power supplied to the antenna and its gain relative to a half-wave dipole in a given direction.

Equivalent Isotropically Radiated Power (e.i.r.p.). The product of the power supplied to the antenna and the antenna gain in a given direction relative to an isotropic antenna.

Fixed Service. A radiocommunication service between specified fixed points.

Fixed Station. A station in the fixed service.

Land Mobile Service. A mobile service between base stations and land mobile stations, or between land mobile stations.

Land Mobile Station. A mobile station in the land mobile service capable of surface movement within the geographic limits of a country or continent.

Land Station. A station in the mobile service not intended to be used while in motion.

Mobile Service. A radiocommunication service between mobile and land stations, or between mobile stations.

Mobile Station. A station in the mobile service intended to be used while in motion or during halts at unspecified points.

Narrowband PCS. PCS services operating in the 901-902 MHz, 930-931 MHz, and 940-941 MHz bands.

National Geodetic Reference System (NGRS): The name given to all geodetic control data contained in the National Geodetic Survey (NGS) data base. (Source: National Geodetic Survey, U.S. Department of Commerce)

Personal Communications Services (PCS). Radio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks.

Subpart B -- Applications and Licenses

GENERAL FILING REQUIREMENTS

§ 99.10 Scope.

This subpart contains the procedures and requirements for filing applications for licenses to operate radio facilities in the personal communications services. Part 1 of the Commission's rules contains additional applicable procedures governing forms, fees, processing procedures, special temporary authority, assignment or transfer of control, and environmental impact.

§ 99.11 Initial authorization.

(a) An applicant will file an application for an initial authorization in each market and frequency block desired.

(b) Blanket licenses are granted for each market and frequency block. Applications for individual sites are not needed and will not be accepted.

§ 99.12 Eligibility.

Any entity, other than those precluded by Section 310 of the Communications Act of 1934, as amended, 47 U.S.C. § 310, or Sections 99.202(c) or 99.204, is eligible to hold a license under this part.

§ 99.13 MTAs and BTAs.

PCS license areas are based on Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) as defined in the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, pages 36-39. In addition to the MTAs and BTAs, the Commission licenses five insular areas: American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and United States Virgin Islands.

(a) There are 51 MTA-based licenses available per frequency block or assigned frequency.

(1) There are 47 MTAs as defined by Rand McNally.
(2) Alaska is separated from the Seattle MTA and is licensed separately.
(3) Guam and the Northern Mariana Islands are licensed as a single MTA-like area.
(4) Puerto Rico and the United States Virgin Islands are licensed as a single MTA-like area.
(5) American Samoa is licensed as a single MTA-like area.
(b) There are 492 BTA-based licenses available per frequency block or assigned frequency.
(1) There are 487 Basic Trading Areas as defined by Rand McNally.
(2) American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands are licensed separately as a BTA-like area.

§ 99.15 License period.

Licenses for service areas will be granted for ten year terms from the date of original issuance or renewal.

§ 99.16 Criteria for comparative renewal proceedings.

A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, which is the most important comparative factor to be considered in the proceeding, if its past record for the relevant license period demonstrates that the renewal applicant:
(a) Has provided "substantial" service during its past license term. "Substantial" service is defined as service which is sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal; and
(b) Has substantially complied with applicable Commission rules, policies and the Communications Act.

Subpart C -- Technical Standards

§ 99.50 Scope.

This subpart sets forth the technical requirements for use of the spectrum and equipment in the personal communications services.

§ 99.51 Equipment authorization.

(a) Each transmitter utilized for operation under this part and each transmitter marketed, as set forth in Section 2.803 of this chapter, must be of a type that has been authorized by the Commission under its type acceptance procedure for use under this part.

(b) The Commission periodically publishes a list of type accepted equipment, entitled "Radio Equipment List, Equipment Accepted for Licensing." Copies of this list are available for public reference at the Commission's offices in Washington, D.C., at each of its field offices, and may be ordered from its copy contractor.

(c) Any manufacturer of radio transmitting equipment to be used in these services may request equipment authorization following the procedures set forth in subpart J of Part 2 of this chapter. Equipment authorization for an individual transmitter may be requested by an applicant for a station authorization by following the procedures set forth in Part 2 of this chapter. Such equipment if approved or accepted will not normally be included in the Commission's Radio Equipment List but will be individually enumerated on the station authorization.

(d) Applicants for type acceptance of transmitters that operate in these services must determine that the equipment complies with IEEE C95.1-1991, "IEEE Standards for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz" as measured using methods specified in IEEE C95.3-1991, "Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields - RF and Microwave." The applicant for type acceptance is required to submit a statement affirming that the equipment complies with these standards as measured by an approved method and to maintain a record showing the basis for the statement of compliance with IEEE C.95.1-1991.

§ 99.52 RF hazards.

Manufacturers are required to ensure that their equipment complies with IEEE C95.1-1991. For the purposes of determining compliance with this standard, all equipment shall be considered to operate in an "uncontrolled" environment.

§ 99.53 Calculation of height above average terrain (HAAT).

(a) HAAT is determined by subtracting average terrain elevation from antenna height above mean sea level.

(b) Average terrain elevation shall be calculated using elevation data from a 30 arc second or better Digital Elevation Models (DEMs). DEM data is available from United States Geological Survey (USGS). The data file shall be identified. If 30 arc second data is used, the elevation data must be processed for intermediate points using interpolation techniques; otherwise, the nearest point may be used. If DEM data is not available, elevation data from the Defense Mapping Agency's Digital Chart of the World (DCW) may be used.

(c) Radial average terrain elevation is calculated as the average of the elevation along a straight line path from 3 to 16 kilometers extending radially from the antenna site. At least 50

evenly spaced data points for each radial shall be used in the computation.

(d) Average terrain elevation is the average of the eight radial average terrain elevations (for the eight cardinal radials).

(e) The position location of the antenna site shall be determined to an accuracy of no less than ±5 meters in both the horizontal (latitude and longitude) and vertical (ground elevation) dimensions with respect to the National Geodetic Reference System.

Subpart D -- Narrowband PCS

§ 99.100 Scope.

This subpart sets out the regulations governing the licensing and operations of personal communications services authorized in the 901-902, 930-931, and 940-941 MHz bands (900 MHz band).

§ 99.102 Licensed service areas.

PCS in the 900 MHz band is available on a nationwide, Major Trading Area (MTA), and Basic Trading Area (BTA) basis. MTA and BTA-based licenses are defined in Section 99.13.

(a) The 11 nationwide licenses are for the 50 states, District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and United States Virgin Islands.

(b) In each of the 51 MTA service areas, there are 13 licenses available.

(c) In each of the 492 BTA service areas, there are 10 licenses available. The eight unpaired mobile transmit channels are available only to public mobile service licensees and private land mobile radio service licensees.

§ 99.103 Construction requirements.

(a) Licensees of nationwide service area channels must construct at least 250 base stations within five years of being licensed and at least 500 base stations within ten years of being licensed and notify the Commission when each benchmark is met.

(b) MTA licensees must construct base stations to provide coverage to approximately 25 percent of the geographic area of their licensed service area within five years of being licensed and 50 percent of the geographic area of their licensed service area within ten years of being licensed. Alternatively, licensees of MTA service area channels must construct at least 25 base stations within five years of being licensed and 50 base stations within ten years of being licensed. In either case, the MTA licensee must notify the Commission when each benchmark is met.

(c) Licensees of BTA service area channels must construct at least one base station and begin providing service in their licensed service area within one year of being licensed and notify the Commission when the benchmark is met.

(d) In evaluating compliance with the above construction requirements, each base station will be considered to serve a geographic area of 3000 square kilometers. In the case of low power base stations, compliance with the construction requirements will be determined by aggregating the actual service areas of the low power stations divided by 3000 square kilometers to determine an equivalent number of base stations.

(e) Failure by any licensee to meet the above construction requirements will result in forfeiture of the license and the licensee will be ineligible to regain it.

§ 99.130 Frequencies.

(a) Narrowband PCS frequencies, listed below by assigned frequency, are available on a symmetrically paired, asymmetrically paired, and unpaired basis. The licenses are available on a nationwide, Major Trading Area (MTA), and Basic Trading Area (BTA) basis.

SYMMETRICALLY PAIRED FREQUENCIES (MHz)

Base transmit (50 kHz bandwidth)	Mobile transmit (50 kHz bandwidth)	License Area
940.025	901.025	Nationwide
940.075	901.075	Nationwide
940.125	901.125	Nationwide
940.175	901.175	Nationwide
940.225	901.225	Nationwide
940.275	901.275	MTA
940.325	901.325	MTA
940.375	901.375	MTA
940.425	901.425	MTA

ASYMMETRICALLY PAIRED FREQUENCIES (MHz)

Base transmit (50 kHz bandwidth)	Mobile transmit (12.5 kHz bandwidth)	License Area
930.425	901.75625	Nationwide
930.475	901.76875	Nationwide
930.525	901.78125	Nationwide
930.575	901.79375	MTA
930.625	901.80625	MTA
930.675	901.81875	MTA
930.725	901.83125	MTA
930.775	901.84375	MTA
930.825	901.85625	MTA
930.875	901.86875	MTA
930.925	901.88125	BTA
930.975	901.89375	BTA

UNPAIRED FREQUENCIES (MHz)

Mobile transmit[1] (12.5 kHz bandwidth)			License Area
901.90625	901.94375	901.98125	BTA
901.91875	901.95625	901.99375	BTA
901.93125	901.96875		BTA

[1]Limited to paging licensees authorized under Parts 22 and 90 of this chapter.

UNPAIRED FREQUENCIES (MHz)

Base or mobile transmit (50 kHz bandwidth)			License Area
940.775	940.825	940.875	Nationwide
940.925	940.975		MTA

(b) A single licensee is permitted to hold licenses for up to three 50 kHz channels, paired or unpaired. This limit is based on the total spectrum in the licensee's nationwide, MTA, and BTA licenses at any geographic point.

§ 99.131 Authorized bandwidth.

The authorized bandwidth of narrowband PCS channels will be 10 kHz for 12.5 kHz channels and 45 kHz for 50 kHz channels. For aggregated adjacent channels, a maximum authorized bandwidth of 5 kHz less than the total aggregated channel width is permitted.

§ 99.132 Power and antenna height limits.

(a) Stations transmitting in the 901-902 MHz band are limited to 7 watts e.r.p.

(b) Mobile stations transmitting in the 930-931 MHz and 940-941 MHz bands are limited to 7 watts e.r.p.

(c) Base stations transmitting in the 930-931 MHz and 940-941 MHz bands are limited to 3500 watts e.r.p. per authorized channel and are unlimited in antenna height except as provided in paragraph (d) below.

(d) MTA and BTA base stations located between 200 kilometers (124 miles) and 80 kilometers (50 miles) from their licensed service area border are limited to the power levels in following table:

Antenna HAAT in meters (feet) (See § 99.53 for HAAT calculation method)	Effective Radiated Power (e.r.p.) (watts)
183 (600) and below	3500
183 (600) to 208 (682)	3500 to 2584
208 (682) to 236 (775)	2584 to 1883
236 (775) to 268 (880)	1883 to 1372
268 (880) to 305 (1000)	1372 to 1000
305 (1000) to 346 (1137)	1000 to 729
346 (1137) to 394 (1292)	729 to 531
394 (1292) to 447 (1468)	531 to 387
447 (1468) to 508 (1668)	387 to 282
508 (1668) to 578 (1895)	282 to 206
578 (1895) to 656 (2154)	206 to 150
656 (2154) to 746 (2447)	150 to 109
746 (2447) to 848 (2781)	109 to 80
848 (2781) to 963 (3160)	80 to 58
963 (3160) to 1094 (3590)	58 to 42
1094 (3590) to 1244 (4080)	42 to 31
1244 (4080) to 1413 (4636)	31 to 22
Above 1413 (4636)	16

For heights between the values listed above, linear interpolation shall be used to determine maximum e.r.p.

(e) MTA and BTA base stations located less than 80 kilometers (50 miles) from the licensed service area border must limit their effective radiated power in accordance with the following formula:

$$P_W = 0.0175 \times d_{km}^{6.6666} \times h_m^{-3.1997}$$

P_W is effective radiated power in watts.
d_{km} is distance in kilometers.
h_m is antenna HAAT in meters; see Section 99.53 for HAAT calculation method.

(f) All power levels specified above are expressed in terms of the maximum power, averaged over a 100 millisecond interval, when measured with instrumentation calibrated in terms of an rms-equivalent voltage with a resolution bandwidth equal to or greater than the authorized bandwidth.

(g) Additionally, PCS stations will be subject to any power limits imposed by international agreements.

§ 99.133 Emission limits.

(a) The power of any emission shall be attenuated below the transmitter power (P), as measured in accordance with Section 99.132(f), in accordance with the following schedule:

(1) For transmitters authorized a bandwidth greater than 10 kHz:

(i) On any frequency outside the authorized bandwidth and removed from the edge of the authorized bandwidth by a displacement frequency (f_d in kHz) of up to and including 40 kHz: at least 116 Log_{10} ((f_d + 10) / 6.1) decibels or 50 plus 10 Log_{10} (P) decibels or 70 decibels, whichever is the lesser attenuation;

(ii) On any frequency outside the authorized bandwidth and removed from the edge of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 40 kHz: at least 43 Log_{10} (P) decibels or 80 decibels, whichever is the lesser attenuation.

(2) For transmitters authorized a bandwidth of 10 kHz:

(i) On any frequency outside the authorized bandwidth and removed from the edge of the authorized bandwidth by a displacement frequency (f_d in kHz) of up to and including 20 kHz: at least 116 x Log_{10} ((f_d + 5) / 3.05) decibels or 50 + 10 x Log_{10} (P) decibels or 70 decibels, whichever is the lesser attenuation;

(ii) On any frequency outside the authorized bandwidth and removed from the edge of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 20 kHz: at least 43 + 10 Log_{10} (P) decibels or 80 decibels, whichever is the lesser attenuation.

(b) The measurements of emission power can be expressed in peak or average values provided they are expressed in the same parameters as the transmitter power.

(c) When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

(d) The following minimum spectrum analyzer resolution bandwidth settings will be used: 300 Hz when showing compliance with paragraphs (a)(1)(i) and (a)(2)(i) of this section; and 30 kHz when showing compliance with paragraphs (a)(1)(ii) and (a)(2)(ii) of this section.

§ 99.134 Co-channel separation criteria.

The minimum co-channel separation distance between base stations in different service areas is 113 kilometers (70 miles). A co-channel separation distance is not required for the base stations of the same licensee or when the affected parties have agreed to other co-channel separation distances.

§ 99.135 Frequency stability.

(a) The frequency stability of the transmitter shall be maintained within ± 0.0001 percent (± 1 ppm) of the center frequency over a temperature variation of -30° Celsius to +50° Celsius at normal supply voltage, and over a variation in the primary supply voltage of 85 percent to 115 percent of the rated supply voltage at a temperature of 20° Celsius.

(b) For battery operated equipment, the equipment tests shall be performed using a new battery without any further requirement to vary supply voltage.

(c) It is acceptable for a transmitter to meet this frequency stability requirement over a narrower temperature range provided the transmitter ceases to function before it exceeds these frequency stability limits.

Subpart E -- Broadband PCS

§ 99.200 Scope.

This subpart sets out the regulations governing the licensing and operations of personal communications services authorized in the 1850-1890, 1930-1970, 2130-2150, and 2180-2200 MHz bands.

§ 99.202 Frequencies.

The frequencies available in the Broadband PCS service are listed below in accordance with the frequency allocations table of Section 2.106.

(a) The following frequency blocks are available for assignment on an MTA basis:

Block A: 1850-1865 MHz paired with 1930-1945 MHz; and,
Block B: 1865-1880 MHz paired with 1945-1960 MHz.

(b) The following frequency blocks are available for assignment on a BTA basis:

Block C: 1880-1890 MHz paired with 1960-1970 MHz;
Block D: 2130-2135 MHz paired with 2180-2185 MHz;
Block E: 2135-2140 MHz paired with 2185-2190 MHz;
Block F: 2140-2145 MHz paired with 2190-2195 MHz; and,
Block G: 2145-2150 MHz paired with 2195-2200 MHz.

(c) PCS licensees shall not have an ownership interest in frequency blocks that total more than 40 MHz and serve the same geographic area. For the purpose of this provision, PCS licensees are entities having an ownership interest of 5 or more percent in a PCS license.

§ 99.204 Cellular eligibility.

Entities that have attributable ownership interest of 20 percent or more in an entity that is a licensee in the Domestic Public Cellular Radio Telecommunications Service shall not be eligible for assignment of more than one 10 MHz frequency block in any PCS service area where its cellular geographic service area (CGSA) includes 10 or more percent of the population of the PCS service area as determined by the 1990 census, i.e., 10 or more percent of the population of the respective BTA or MTA is within the CGSA.

NOTE 1: For purposes of the 20 percent cellular attribution limit, all ownership interests in cellular operations that serve 10 or more percent of the population of the PCS service area should be included in determining the extent of a PCS applicant's cellular ownership.

NOTE 2: When a party owns attributable interest in more than one cellular system that overlaps a PCS service area, the total population in the overlap area will apply on a cumulative basis.

§ 99.206 Construction requirements.

Licensees must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed, two-thirds of the population in their licensed area within seven years of being licensed, and 90 percent of the population in their licensed area within ten years of being licensed. Population is defined as the

1990 census population. Failure by any licensee to meet these requirements will result in forfeiture of the license and the licensee will be ineligible to regain it.

§ 99.231 Power and antenna height limits.

(a) Base stations are limited to 100 watts (e.i.r.p.) peak power with an antenna height up to 300 meters HAAT. See Section 99.53 for HAAT calculation method. Base station antenna heights may exceed 300 meters with a corresponding reduction in power; see Table 1 below. The service area boundary limit and microwave protection criteria specified in Sections 99.232 and 99.233 apply.

Table 1: Reduced Power for Base Station Antenna Heights Over 300 Meters

HAAT		Maximum E.I.R.P.
Meters	(Feet)	(watts)
≤ 300	(984)	100
≤ 500	(1640)	65
≤1000	(3280)	30
≤1500	(4920)	15
≤2000	(6560)	10

(b) Mobile/portable stations are limited to 2 watts e.i.r.p. peak power and the equipment must employ means to limit the power to the minimum necessary for successful communications.

(c) Peak transmit power must be measured over any interval of continuous transmission using instrumentation calibrated in terms of an rms-equivalent voltage. The measurement results shall be properly adjusted for any instrument limitations, such as detector response times, limited resolution bandwidth capability when compared to the emission bandwidth, sensitivity, etc., so as to obtain a true peak measurement for the emission in question over the full bandwidth of the channel.

§ 99.232 Field strength limits.

The predicted or measured median field strength at any location on the border of the PCS service area shall not exceed 47 dBuV/m unless the parties agree to a higher field strength.

§ 99.233 Interference protection.

(a) Before filing an application for new or modified facilities under this part, the applicant must perform an engineering analysis to assure that the proposed facilities will not cause interference to existing OFS stations within the coordination distance specified in Table 2 of a magnitude greater than that specified in the criteria set forth in paragraphs (b) and (c) of this section, unless there is prior agreement with the

affected OFS licensee. See Section 99.53 for HAAT calculation method. Interference calculations shall be based on the sum of the power received at the terminals of each microwave receiver from all of the applicant's current and proposed PCS operations.

Table 2: Coordination Distances In Kilometers (Miles)

EIRP (Watts)	PCS Base Station Antenna HAAT in Meters (Feet)													
	5 (16)	10 (33)	20 (66)	30 (98)	50 (164)	100 (328)	150 (492)	200 (656)	250 (820)	300 (984)	500 (1640)	1000 (3281)	1500 (4922)	2000 (6562)
1	99 (62)	103 (64)	108 (67)	112 (70)	119 (74)	131 (82)	140 (87)	148 (92)	155 (96)	161 (100)	182 (113)	219 (136)	248 (154)	272 (169)
2	120 (75)	123 (76)	126 (78)	129 (80)	134 (83)	142 (88)	149 (92)	154 (96)	159 (99)	164 (102)	185 (115)	222 (138)	251 (156)	275 (171)
5	154 (96)	157 (98)	161 (100)	164 (102)	168 (105)	177 (110)	183 (114)	189 (117)	194 (121)	198 (123)	214 (133)	242 (150)	264 (164)	283 (176)
10	181 (112)	183 (114)	187 (116)	190 (118)	195 (121)	203 (126)	210 (130)	216 (134)	221 (137)	225 (140)	240 (149)	269 (167)	291 (181)	310 (193)
20	207 (128)	209 (130)	213 (133)	216 (134)	221 (137)	230 (143)	236 (147)	242 (150)	247 (154)	252 (156)	267 (166)	296 (184)	- -	- -
50	241 (150)	244 (152)	248 (154)	251 (156)	256 (159)	265 (164)	271 (169)	277 (172)	282 (175)	287 (178)	302 (188)	- -	- -	- -
100	267 (166)	270 (168)	274 (170)	277 (172)	282 (175)	291 (181)	298 (185)	304 (189)	309 (192)	313 (195)	- -	- -	- -	- -

NOTE: If actual value does not match table values, round to the closest higher value on this table.

(b) For microwave paths of 25 kilometers or less, interference determinations shall be based on the C/I criteria set forth in EIA/TIA Telecommunications Systems Bulletin 10-E, "Interference Criteria for Microwave Systems in the Private Radio Services," November 1990, (TSB10-E).

(c) For microwave paths longer than 25 kilometers, the interference protection criterion shall be such that the interfering signal will not produce more than 1.0 dB degradation of the practical threshold of the microwave receiver for analog systems, or such that the interfering signal will not cause an increase in the bit error rate (BER) from 10^{-6} to 10^{-5} for digital systems.

(d) The development of the C/I ratios and interference criteria specified in paragraphs (b) and (c) and the methods employed to compute the interfering power at the microwave receivers shall follow generally acceptable good engineering practices. The procedures described for computing interfering signal levels in Appendix D of the Second Report and Order, GEN Docket No. 90-314, FCC 93-451 shall be applied. Alternatively, procedures for determining interfering signal levels and other criteria as may be developed by the Electronics Industries Association (EIA), the Institute of Electrical and Electronics Engineers, Inc. (IEEE), the American National Standards Institute (ANSI) or any other recognized authority will be acceptable to the Commission.

§ 99.234 Emission limits.

(a) On any frequency outside all PCS spectrum, the power of any emission shall be attenuated below the transmitter power (P) by at least 43 plus 10 $\log_{10}(P)$ decibels or 80 decibels, whichever is the lesser attenuation.

NOTE: The measurements of emission power can be expressed in peak or average values, provided they are expressed in the same parameters as the transmitter power.

(b) When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

§ 99.235 Frequency stability.

The frequency stability shall be sufficient to ensure that the fundamental emission stays within the authorized frequency block.

Appendix B: Final Regulatory Flexibility Analysis

Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rule Making and Tentative Decision in combined ET Docket No. 92-100 and GEN Docket No. 90-314. Written comments on the proposals in the Notice, including the Regulatory Flexibility Analysis, were requested.

A. Need for and Objective of Rules: Our objective is to provide spectrum allocations, licensing and authorization rules, and technical standards for broadband PCS at 2 GHz. Authorizing this new service will make available a broad range of new services and technologies to both business users and consumers. The PCS rules being adopted will provide licensees and developers of unlicensed equipment the flexibility to introduce a wide variety of new and innovative telecommunications services and equipment.

B. Issues Raised by the Public in Response to the Initial Analysis: A number of parties supported regulations that would facilitate participation in PCS by small businesses. Specifically, these parties argue that small frequency blocks, small service areas, and special consideration for small businesses in the licensing of PCS would facilitate small businesses participation in providing PCS services. The FCC empaneled a Small Business Advisory Committee (SBAC) that also assessed the policy implications of this proceeding for small businesses and filed a report with the Commission on September 15, 1993, which is attached as Appendix C. The SBAC also concludes that small frequency blocks with multiple licensees in each service area and a frequency block designated for qualified small, female, and minority businesses would assist entrepreneurial entry in PCS. The SBAC also suggested that the Commission consider other mechanisms to foster entry opportunities and capital formation for such groups. These issues and the associated comments are considered and addressed in this Second Report and Order, except issues related to licensee selection procedures. Licensing issues are the subject of the Omnibus Budget Reconciliation Act of 1993 and are being addressed in a separate proceeding that proposes rules to implement competitive bidding, PP Docket No. 253, Notice of Proposed Rule Making, released October 12, 1993. In accordance with the provisions of the Budget Reconciliation Act, as part of the competitive bidding rule making we consider whether special conditions should apply to two of the seven frequency blocks available for PCS operation at 2 GHz, including a possible reservation or set aside, to promote participation in PCS by small businesses, rural telephone companies and businesses owned by minorities and women.

C. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives: We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary to ensure that the public receives the benefits of PCS in a prompt and efficient manner. We will continue to examine alternatives in the future with objectives of eliminating unnecessary regulations and minimizing any significant impact on small entities.

Appendix C

REPORT OF
THE FCC SMALL BUSINESS ADVISORY COMMITTEE
TO THE FEDERAL COMMUNICATIONS COMMISSION
REGARDING GEN DOCKET 90-314
SEPTEMBER 15, 1993

SUBMITTED THROUGH FCC OSBA SEPTEMBER 15, 1993

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EXECUTIVE SUMMARY

In order to assess the policy implications of General Docket 90-314, the FCC Small Business Advisory Committee (SBAC) held hearings in Washington, D.C. on May 27, 1993 and September 14, 1993. The Committee elicited testimony from industry leaders and other interested parties. Our findings and recommendations are summarized below.

Findings

- Entry opportunities for small service providers have been constrained in existing telecommunications markets by undercapitalization, concentration of ownership, and other conditions contributing to the exclusion of businesses owned by minorities and women.

- Capital formation is one of the major economic barriers to full participation by small and minority owned businesses.

- The FCC can make these barriers surmountable through its crafting of interlinking policies which affect the amount of cash required based on (1) the amount of spectrum bid, and (2) the size of the licenses. Additional measures including bidding enhancements and tax expenditure finance assistance are appropriate regulatory tools to ensure that the public receives the best practical service from emerging PCS technologies, and to increase economic opportunities in the PCS field.

Recommendations

Regulatory Proposals

- Service area designations and bandwidth assignments should attempt to remove significant impediments to entrepreneurial entry in the PCS field that could accompany a system of licensing based on competitive bidding.

  - Allocate a spectrum block for qualified small, female and minority businesses;

  - Allocate small spectrum blocks, e.g., 20 Mhz-25 Mhz per license;

  - Provide for multiple licenses in each geographic area.

  - Allow for an exemption to any proposed spectrum caps in a market where a joint venture exists with a small, female or minority business.

- The Commission should encourage innovative and efficient service proposals by designing bidding methodologies, and supporting policies, to encourage entry opportunities and capital formation:

  - Use eligibility requirements for bidding designed to encourage equal employment opportunities, opportunities for minority and female vendors, and formation of strategic small business alliances with large LECs and cellular operators.

  - Allow applicants to certify financial qualifications based on "highly confident" letter and letters of intent from qualified investment banking firms, venture capital funds and Specialized Small Business Investment Companies.

  - Encourage strategic small business alliances generally by awarding "innovator's bidding credits" equal to 10% of an applicants bid.

  - Allow installment payments and royalty arrangements for qualified small, female and minority businesses.

  - Authorize distress sales to small business entities where winning bidders are ineligible, unqualified, unable to pay, or unable to complete construct requirements.

- Seek legislation establishing a communications capital fund from revenues generated by spectrum auctions.

o The Commission should also authorize use of tax certificate and other financing techniques, in consultation with the SBA and the IRS, to encourage capital formation:

  - Fixed microwave licensees seeking tax certificates for relocation.

  - SBA licensed Specialized Small Business Investment Companies that furnish financial and technical assistance to small PCS licensees owned by members of minority groups, women and disadvantaged rural entities.

  - Owners and investors in minority owned and controlled PCS licensees.

Classification Standards

o The criteria for small, female, and minority business standards should be consistent with the Small Business Administration's (SBA) current standards for small and minority business concerns applying for financial and or management assistance from Small Business Investment Companies (SBIC) under the SBIC program.

o The Commission should request comment from the public, after consulting with the SBA, to determine complementary eligibility standards for PCS capital formation policies.

o Minority and female controlled entities should be subject to anti-trafficking requirements, should maintain 51% equity and voting control from the initial grant through construction and operation of the PCS license.

MARKET OVERVIEW

Our review of existing radiotelephone industries confirmed that the universe of potential service providers is significantly constrained by increasing concentration of ownership and undercapitalization. In our view, the introduction of competitive bidding procedures is more likely to compound, rather than relax, these impediments to market entry.

Need for Economic Opportunity

Economic opportunities for rural telephone companies, omnibus businesses owned by members of minority groups and women are major policy objectives of the Budget Reconciliation Act of 1993.[1] The legislative history of the Act indicates that the House Committee on Energy and Commerce was generally concerned that "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." (emphasis added) Following the Committee's initial concerns with small business generally, concerns arose that specific provisions were needed to "ensure that businesses owned by members of minority groups and women are not in any way excluded." The House Report goes on to state that the "Committee anticipates that in some instances the Commission will act in a manner that is comparable to a mortgage banker, who designs new mortgage instruments in order to increase the universe of people who can afford to buy homes."[2] (emphasis added) Senate-sponsored amendments later reflected similar concerns with respect to rural telephone companies. Thus, the economic opportunity provisions invite reference to the distinct public interests in disseminating licenses among a wide variety of applicants in the future to avoid excessive concentration of ownership,[3] and preempting exclusion of minorities and women from communications

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1 Pub.-Law 103-66, Title VI, 107 stat. 312.

2 Id., at p. 9.

3 The District Court for the District of Columbia recognized that avoidance of concentration of ownership initially justified efforts to encourage small business growth in electronic publishing through line of business restrictions under the AT&T consent decree. United States v. AT&T, 552 F. Supp. 131, 183 (D.C.D.C. 1983). The Commission has also invoked the public interest in internodal competition and new and expanded telecommunications service to justify inclusionary ownership policies for satellite transponders and earth stations. World Communications, Inc. v. FCC, 735 F. 2d 1465, 1475 (D.C. Cir. 1984) (transponder sales) (1934 Act arms FCC with "elastic powers to accommodate dynamic new developments in the field of communications"); TRT Telecommunications v. FCC, 876 F. 2d 134 (D.C. Cir. 1989) (earth stations).

ownership.

Barriers To Market Entry

While uncertainty exists about the precise economic impact of the future PCS market structure, based on our findings, we are concerned that existing investment policies and practices, concentration of ownership, and undercapitalization, pose a serious risk that competitive bidding for spectrum will unduly burden, and in some cases foreclose, entry opportunities for small service providers.

Investment Trends

Although the precise economic impact of the future PCS marketplace is difficult to predict, it is widely accepted that the "primary obstacle to new entrants is lack of capital ..."[4] According to a recent NTIA study, taxation of capital gains is a major contributor to the high cost of capital for U.S. telecommunications firms.[5] The United States is the only major industrialized country that neither provides any capital gains tax relief or relief from double taxation of corporate profits. For this reason, some conclude that the internal revenue code "penalizes equity investment to a greater extent than any of our foreign rivals." The decline in capital available to small start-up firms following the passage of the 1986 Tax Reform Act, which raised capital gains tax rates by 40%, dramatically illustrates the adverse effect of current tax policy on small business investment. Between 1986 and 1991, the amount of venture capital made available to start new companies fell from $4.19 billion to $1.41 billion - a two thirds decline in financing for small business. During the same period, the number of start-up firms financed with venture capital dropped from 1,512 in 1986 to 792 in 1991.[6]

Debt financing practices among institutional lenders have also been cited as a cause of debt capital unavailability to small entities, including small FCC regulatees. Acquisition and operation of regulated communications facilities is extremely capital intensive. Without a track record of ownership

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4 Statement of Barry Pineles, Assistant Chief Counsel for Market Competition Before the FCC Small Business Advisory Committee, May 27, 1993, p. 6.

5 U.S. Department of Commerce, Telecommunications in a Global Economy: Competitiveness at the Crossroads, Washington, D.C., (1990), p. 29.

6 McArdle, "Can Gov't Afford Cap Gains Hike?" Investor's Business Daily, July 22, 1993, p. 1, 2.

and substantial capital resources, new entrants typically encounter difficulties obtaining start-up funds. Lenders are frequently reluctant to finance loans, even when applicants have a track record, since FCC licenses cannot be used for collateral. Lenders also prefer to work with multiple-property owners.

Concentration of Ownership

Recent market trends in the existing radiotelephone industry suggest a trend toward concentration of ownership. SBA sales and employment data shows that a significant decline in the total number of firms in the radiotelephone industry coincided with declines in sales and employment shares among radiotelephone operators with less than 249 employees between 1989 and 1991. Of a total of 990 firms in SIC Code 481 in 1989, 971 firms with 249 employees or less possessed a 35.1 percent cumulative market share in 1991, compared to 927 firms in the same employment size range with a cumulative market share of 52.5 percent in 1989. In contrast, there were a total of 19 firms with over 249 employees commanding a 64.9 percent cumulative market share in 1991, compared to 21 firms of the same size range with a cumulative market share of 47.5 percent in 1989. SBA data on employment growth patterns shows that employment decreases due to firm "deaths" exceeded employment increases due to firm "births." We interpret data concerning firm "deaths" to mean that contraction among firms with less than 249 employees is due in part to attrition, and is not entirely explained by consolidation of ownership in the radiotelephone industry.

Racial and Gender Disadvantage

Women and members of minority groups have encountered special barriers to telecommunications ownership.[7] At a time when women are becoming a major force in the world of small business generally, significant disparities between female ownership in telecommunications and the general economy persist. Between 1982 and 1987, the number of women owned proprietorships, partnerships, and Subchapter S corporations rose from 2,612,621 to 4,112,787, an increase of about 58% compared to a 26.2 percent increase among small businesses generally. In addition, total receipts of women owned businesses nearly tripled over this period -- rising from $98.3 billion in

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7 Letter of Hon. Larry Irving, Asst. Sec. for Communications and Information, to Hon. James H. Quello, Acting Chairman, FCC, September 14, 1993. ("We encourage the Commission to develop rules to implement competitive bidding for PCS that will provide greater opportunities for participation by groups currently underrepresented in telecommunications industries").

1982 to $278.1 billion in 1987, compared to a 55% increase among small businesses as a whole during the same period. The Census Bureau's Survey of Women owned businesses showed that 30% of U.S. businesses were owned by women. The industry subgroup containing transportation, communications, and public utilities, however, accounted for only 1.9% of the women owned firms.[8]

The advocacy group American Women in Radio and Television suggests that lack of financing may account for the disparities between the percentage of communications businesses owned by women and the percentage of all businesses owned by women. "No existing FCC policy provides an incentive for women to enter the [communications] business. Nor are there any small business investment companies operating to assist women..."[9] In view of the disparity between the statistical profile of businesses owned by women in telecommunications and the profile of women in other areas of the economy, we believe the lack of telecommunications-specific financial and technical assistance should be considered significant impediment to market entry.

Businesses owned by minorities also face special problems. A recent study by the U.S. Minority Business Development Agency found minority firms represent only 0.5 percent of all firms in SIC Code 4812 and 4813 combined.[10] In that study, moreover, researchers found only 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging, or messaging services, while only 11 minority firms in SIC Code 5065 distribute cellular equipment.

The factors that have precluded minorities from effective participation in ownership of radio facilities involve access to finance, but are difficult to isolate or quantify. Dr. JoAnn Anderson, Director of NTIA's Minority Telecommunications Development Program, testified at our May hearing that there are often similarities between small businesses and minority businesses indicating that capital access is a problem for small businesses across the board, but "minorities will have additional

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8 Letter of Melodie Virtue, Vice President Government relations, American Women in Television and Radio, August 6, 1993.

9 Comments of AWRT in MM Docket 91-140, pp. 2, 8 (citing The State of Small Business: A Report to the President, 1991).

10 Market Analysis of the Telecommunications Industry - Opportunities for Minority Businesses, U.S. Minority Business Development Agency: Washington, D.C. (1991)

problems."[11] One additional problem is that minorities frequently do not or cannot use traditional sources of financing, and that the most frequent source of capital is family savings and friends.[12] Another problem noted by the U.S. Senate is that spectrum for radio facilities was first allocated at a time when "undisguised discrimination in education, employment opportunities, and access to capital excluded minorities from all but token participation."[13] Thus, through no fault of their own, minorities were impeded from competing successfully for licenses when they were first awarded and as they became available in the market due to systemic barriers to technical training and employment opportunities.[14]

Consequences of Spectrum Malapportionment

Burdens on small business entry poses a risk of spectrum malapportionment that could significantly limit the value of PCS spectrum to society as a whole. While companies of all sizes are potential contributors to innovation and efficiency, many technological advances in recent years have been introduced by small firms and new entrants. For instance, 55 percent of all technological innovations are attributable to firms with less than 500 employees.[15] Studies have also shown that small firms innovate at a per person rate twice that of large firms, spend more on research and development, and translate research and development spending into new products more efficiently than large firms.[16] In addition, "[s]mall businesses were responsible for 33.1 percent of employment and 45.7 percent of the growth in the communications sector from 1986-1988, and accounted for 90 percent of all new jobs created in fiscal year 1990."[17] Nontechnical innovation and efficiency also

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11 Statement of JoAnn Anderson, PhD. Before the FCC Small Business Advisory Committee, May 27, 1993.

12 Anderson, supra, note 8.

13 Brief of the U.S. Senate As Amicus Curiae in Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990), p. 32, 33.

14 See, Telecommunications Minority Assistance Program, 1978 Pub. Papers 253 (President Carter).

15 "Characterizations of Innovations Introduced on the U.S. market in 1982," U.S. Small Business Administration.

16 Joint Petition for Further Rulemaking of Advanced Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc., in Gen. Docket 90-314, Exhibit #3, pp. 12, 13.

17 Statement of PCS Action, Inc. Submitted to the FCC Small Business Advisory Committee, May 27, 1993, p. 1.

appears to vary with ownership and control factors. The Congressional Research Service found that, compared to stations with no minority ownership, most radio stations in which members of minority groups hold an interest provide services designed to meet the needs of a diverse array of consumer groups including women, children, senior citizens, and foreign language groups.[18] Thus, underrepresentation or exclusion of applicants likely to introduce innovative and efficient service has direct implications for small businesses and residential consumers who seek expanded communications capabilities offered by PCS technologies.

Some have argued that the productivity and competitiveness of the nation's citizens and small businesses are severely limited by inferior telecommunications capabilities.[19] Unlike large business users, small and medium sized users frequently lack in-house managers, advanced telecommunications equipment and service options, redundant telecommunications capabilities during disasters and outages, and the inability to collect proprietary information about calling patterns. Critics also allege that these inferior telecommunications capabilities are in part the result of certain tariff restrictions imposed by LECs, and other 'use' and 'user' restrictions, that arbitrarily prevent small businesses from establishing sharing arrangements to achieve volumes and economies of scale enjoyed by larger businesses. Residential communities also have specialized needs. Possible consumer uses for PCS include personal emergency situations, routine point-to-point communications,[20] transmission of medical data, and dissemination of news, information services, and educational materials. Rural populations may also benefit from use of PCS technologies for mobile emergency and activities, farming applications, and rural community hospitals and clinics.[21] Based on available data, we believe a universe of service providers that utilizes small businesses is most likely to meet these specialized needs of small businesses and residential consumers effectively and efficiently.

DISCUSSION OF REGULATORY PROPOSALS

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18 CRS, Minority Broadcast Station Ownership and Broadcast Programming: Is there a Nexus? (June 29, 1988).

19 Gorosh, Steve, Small Business, Telecommunications, and Economic Development, California Western Law Review, Spring 1993.

20 Barrett and Marchant, Emerging Technologies and Personal Communications Services: Regulatory Issues, Commlaw Conspectus Vol. 1, p. 7.

21 CTIA White Paper #7: For Small Business, PCS is a Big Deal, September 8, 1993, p. 3.

Overview

One major challenge remaining before the Commission in Docket 90-314 is the task of implementing the economic opportunity provisions of the Budget Reconciliation Act.In this section of our report, we discuss specific proposals for implementing economic opportunity safeguards. In general, our recommendations seek to promote capital formation and entry opportunities through allocation of local spectrum blocks for small business applicants, size conscious bidding methodologies, and a PCS tax certificate program.

Prior to the passage of the Act in August, the Commission adopted a First Report and Order concerning eligibility criteria, service areas, and spectrum allocation for narrowband PCS, which represents an important first step in bringing PCS technologies to the marketplace. The First Report and Order[22] will create 5,500 new licensing opportunities for national, regional, and local narrowband PCS providers, including licensing opportunities for small business at the local level, and ancillary marketing and equipment manufacturing opportunities. The Act opens the door to more pro-active steps along these lines by providing the Commission with explicit authority to promote economic opportunity.

Under the Act, the Commission has several means to promote the public interest in the use of spectrum and encourage economic opportunity, competition, and new and expanded telecommunications services. The overriding purpose of the Act is to improve licensing and spectrum allocation by authorizing competitive bidding procedures with safeguards to protect the public interest in the use of spectrum. The text of the Act plainly contemplates that safeguards in the form of small business ownership regulations that further economic opportunity. First, the Act directs the Commission to design competitive bidding procedures that will avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants. 47 U.S.C. 309(j)(3). The Act further directs the Commission to prescribe area designations and bandwidth assignments that promote economic opportunity for a wide variety of applicants. 47 U.S.C. 309(j)(4)(C). Finally, the Act directs the Commission to consider the use of tax certificates, bidding preferences, and other procedures to ensure that small businesses are given opportunities to participate in providing spectrum based services. 47 U.S.C. 309(j)(4)(D).

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22 GEN. Docket No. 90-314 58 FR 42681 (August 11, 1993).

Service Areas and Bandwidth Assignments

Background

Our May hearing revealed several differing viewpoints on the way service area and bandwidth assignments might be used to promote small business participation. The Small Business PCS Association (SBPA) emphasizes that small businesses will be effectively excluded from all but the smallest service area being considered due to the capital intensive nature of PCS technology, and that even the Basic Trading Area "will be a large bite for small businesses to swallow in large metropolitan areas." SBPA's recommends two regional service areas and two BTA's spectrum blocks for small business eligibles. One of the small business BTA spectrum blocks would be awarded as a "Small Business Developer's License" to a qualifying small business experimental license holder who has put forth significant effort and investment in developing the service being licensed.[23]

APC, an advocate of 40 MHz allocations, maintains that small spectrum blocks will delay deployment, cripple local licensees with high infrastructure costs, and deny economies of scale enjoyed by entrenched competitors.[24] According to APC, a better way to target programs for small and minority entrepreneurs is to provide an opportunity for PCS licensees to "franchise" portions of licensing areas to other entities. APC, like SBPA, also points out that a spectrum set-aside may also be a reasonable means to promote entry by small service providers. APC notes that several agencies of the federal government, such as the U.S. Forest Service, the Bureau of Land Management, and the Bureau of Indian Affairs, employ set-asides to foster small business participation in government auctions.[25]

In a similar vein, MCI originally proposed in the PCS rulemaking that the FCC issue three national PCN licenses, by comparative hearings, to qualified consortia subject to ownership requirements to ensure local diversity; or alternatively, two national licenses with 40 MHz of spectrum

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23 Letter of Robert H. Kyle, Chairman, Small Business PCS Association, August 7, 1993.

24 Statement of Gary L. Thomas, American Personal Communications, Inc., May 27, 1993.

25 American Personal Communications, Small Business and Minority Participation in the PCS Industry (August 1993).

and two local licenses with 20 MHz of spectrum. According to MCI, small, minority and female entrepreneurs would benefit from the significant opportunities this approach offers to participate in national consortia as local PCS operators.[26] We discuss these approaches below.

Discussion

Our basic premise is that the primary business opportunities the Commission should promote with service areas and bandwidth assignments are those that provide direct licensing opportunities for small service providers, and that mechanisms to encourage new entrants must be balanced with the larger objective of encouraging the best practicable service to the public. Based on these considerations, we have decided to support a regulatory structure with four to five service providers with 20-25 MHz of spectrum in small service areas of equal size, with one spectrum block for small business PCS applicants in the lower band.

Service Areas. In our view, a regulatory structure with many providers, and a large number of small service areas, is likely to promote competition, accelerate deployment, encourage diverse services, and promote economic opportunities. Small service areas permit parallel efforts to deploy PCS infrastructure. Small service areas could also have important benefits during the initial implementation of PCS when the market is still being defined. Accordingly, we support the use of local service areas based on Rand McNally Basic Trading Areas.

In order to ensure that small licensing areas will not be barrier to delivery of wide area services, the Commission should encourage existing standards-setting bodies to adopt a voluntary "Common Air Interface Standard" for handsets and base stations. The Commission could chose the standard by soliciting recommendations from the Telecommunications Industry Association (TIA), the Institute of Electrical and Electronic Engineers (IEEE), and the Advisory Group of Accredited Standards Committee (T1). We propose that each organization submit no more than two standards by April 1, 1994. The Commission could then publish and distribute the recommendations to facilitate consensus on standards issues among small businesses interested in participating in auctions.

Bandwidth Assignments. We recognize that debate over large vs. small spectrum blocks

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26 Remarks of Steven Zecola, MCI, Inc., May 27, 1993.

involves any valid concerns. For instance, the costs of relocating existing users may be less with large spectrum blocks since licensees could more easily avoid certain frequencies encumbered by microwave users. Larger allocations could also lead to alternative services, such as larger bandwidth data or imaging services, and affordable equipment for consumers. However, since comparable efficiencies could be accomplished through issuance of tax certificates to microwave incumbents, and by allowing aggregation through group license bids, we are not persuaded that PCS technically requires 40 MHz of spectrum. Instead, we believe that the competition that would result from four or five licenses in each market will better serve the public interest, and foster maximum economic opportunities. For these reasons, we conclude that 20-25 MHz is a reasonable allocation of spectrum for PCS. To ensure that small businesses are not excluded from licensing opportunities due to the use of competitive bidding, we also support at least one 20 -25 MHz allocation for small business PCS applicants in the lower band. In any event, the amount of spectrum for the small business allocation should be consistent with the predominant spectrum block allocations.

Conclusion

As indicated before, our vision of PCS leads us to endorse direct mechanisms for promoting economic opportunities rather than rely on indirect "trickle-down" approaches. Nevertheless, we are aware that small service areas and spectrum blocks will provide only a limited number of opportunities for small service providers. Because fixed and operating capital requirements will deter many small companies from participating in PCS as licensees, strategic alliances with larger entities may well be a practical economic necessity for many small companies. For these reasons, we construe the principle of economic opportunity broadly to encompass diverse forms of commercial participation, such as procurement of goods and services and strategic alliances. We examine ancillary opportunities below in the context of regulatory proposals addressing bidding preferences and other procedures.

Bidding Methodology

Bidder Eligibility Conditions

Background. We strongly endorse the principle of encouraging the widest possible participation by private enterprise in PCS development. Some have suggested that the Commission should condition eligibility to bid on minimum procurement efforts as a means to further minority and small business enterprise. For instance, the National Association of Black Owned Broadcasters points

out that "the Commission must create a system of minority incentives similar to those used by other agencies and departments of the Federal government."[27] APC likewise notes that several agencies of the federal government, such as the SBA and the Department of Defense, employ incentive policies to provide small business participation in auctions of government property rights.[28] We note, however, that the Commission has not requested comment on either of these approaches. In our view, if the regulatory structure for PCS fails to include these types of participatory safeguards, it will fail to achieve the widest possible participation by private enterprise.

General Bidder Eligibility Requirements. We agree that the interest in the widest possible participation could be furthered by requiring a "trustee" commitment from PCS bidders. As a basic condition of eligibility, we believe all bidders should be required to establish and maintain programs designed to ensure that minorities and women are not excluded from licensee efforts to procure equipment and value added services, and to recruit, hire and promote employees. Regulations dealing with employment and procurement practices of PCS regulatees, such as those currently applicable to cable television system operators, can be justified as necessary to enable the FCC to satisfy its obligation under the Omnibus Budget Reconciliation Act to ensure that the regulatory structure for emerging technologies fosters economic opportunity, competition, and new and expanded telecommunications services.[29] As Congress, and the Commission acknowledged in the cable context, employment and procurement opportunities are significant areas of economic opportunity which enhance the prospects for telecommunications ownership by minorities and women. In the long run, employment and procurement opportunities should also reduce capital formation difficulties businesses owned by minorities and women face due to lack of technical and managerial experience in the telecommunications field.

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27 Letter of James L. Winston, Esq., Executive Director and General Counsel, National Association of Black Owned Broadcasters, May 27, 1993, p. 2.

28 We believe targeted policies encouraging employment and procurement opportunities for minorities and women are consistent with range of economic opportunities made possible by programs of other federal agencies. The SBA's section 8(a) procurement program identifies government contracts that should be awarded only to small disadvantaged firms. 13 CFR §124.307 et seq. The Department of Defense uses targeted policies to reach its statutory goal of awarding five percent of its contracting and subcontracting dollars to small disadvantaged firms. See generally, DFAR 219.5.

29 Compare, NAACP v. FPC, 425 U.S. 662 (1976). See also, Non-discrimination in Common Carrier Employment Practices, 24 FCC 2d 725 (1970).

Cellular and LEC Bidding Requirements. In the interest of economic opportunity, we also support entry provisions for rural cellular licensees and LECs. However, we do have strong reservations about the merits of allowing unconditional eligibility for large cellular licensees and LECs in view of the potential for anti-competitive warehousing of spectrum. The need for restrictions on cellular eligibility presents an opportunity to encourage small business participation. While we are somewhat skeptical about the franchisee relationship as a primary means to promote viable opportunities for new entrants, we view bona fide local consortia, and joint venture arrangements, as a reasonable quid pro quo for eligibility for large cellular and LEC entities -- if they provide new entrants with an equity ownership stake in the licensee entity. We believe this proposal is justified by the fact that the overhead and competitive position of these firms are substantially enhanced by pre-existing infrastructure. Unless eligibility to pursue local licensing opportunities is conditioned on a requirement to form strategic alliances with new entrants, the viability of licensing opportunities for small applicants may be reduced.

Financial Certification Guidelines

In order to realize the full potential of competitive bidding to streamline the licensing process, we believe it is appropriate to permit applicants to self-certify financial qualifications, as outlined below. First, the Commission should affirm that a small applicant may support all, or a substantial part, of the required financial showings with a proposal for an initial public offering, as in Advanced Mobile Phone Service, Inc., 91 FCC 2d 512, 517 (1982). There, the Commission held that an investment banker's letter, combined with the applicant's internal funds and bank commitments, constituted a reasonable assurance.[30] In addition, the Commission noted that the rules contemplate that "applicant might need equity financing," and while this was a case of first impression, the IPO proposal deserved "careful analysis" because "we never before licensed such costly facilities..." Id. We believe the need of PCS applicants, especially minority owned applicants, for equity financing to cover the unprecedented cost of acquiring construction permits and building PCS facilities likewise

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30 The Commission cited three factors to justify its holding: (1) a large and experienced investment banker was familiar with the marketplace's reaction to the applicant's offerings based on three previous successful financings; (2) the banker had analyzed the applicant's ability to develop additional, sophisticated mobile communications services; and (3) a group of qualified lending institutions had established credit for the applicant aggregating approximately two thirds of the funding required for construction of the proposed cellular facilities.

justifies combined use of "highly confident" letters, letter of intent and commitment letters to satisfy applicable financial qualifications.

Second, the Commission should adopt financial qualifications guidelines that treat SBA chartered Small Business Investment Companies (SBICs) and Specialized Small Business Investment Companies (SSBICs), as bona fide financial institution for reasonable assurance purposes.[31] The source of an SSBICs capability to act as a de facto financial institutions for small entities stems from their ability to leverage $3 - 4 from the SBA for every $1 of equity capital from private sources pursuant to the Small Business Investment Act of 1958.[32] As such, SBICs are an integral part of the national policy encouraging development of small business, frequently come under the FCC's ancillary jurisdiction by virtue of the assistance they render to FCC regulatees. In this regard, we note that "Administrative agencies have been required to consider other federal policies ... when fulfilling their mandate to assure that their regulatees operate in the public interest... [A]gencies should constantly be alert to determine whether their policies conflict with other federal policies and whether such conflict can be minimized... [E]stablishment of policies that would accommodate ... diverse interests ... is [also] in keeping with the overall agency responsibility.[33] Treating SBICs as financial institutions is consistent with both the Commission's overall responsibility, and its stated policy for purposes of cellular financial commitments, that "we do not wish to exclude smaller entities with the financial ability and genuine desire to finance cellular systems."[34] As indicated in the section below on tax certificates, we believe tax certificates would also enhance the financial ability of SBICs to assist FCC regulatees.

Innovator Bidding Credits

Background. Of course, the central concern over the use of competitive bidding lies in

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31 Compare, Application for Review of Salt City Communications, Inc, in MM Docket 89-311 (August 6, 1993) (File No. BPH-870918MN).

32 Storer Broadcasting Company, 70 FCC 2d 709 (1979). SBICs are allowed to leverage $3 from the SBA per $1 of private capital, while SSBICs can leverage $4 per $1 of private capital.

33 LaRose v. FCC, 494 F. 2d 1145 (D.C. Circuit 1974).

34 Rules for Rural Cellular Service, 4 FCC Rcd 2542 (1988). See also, Washington's Christian Television Outreach, Inc., BC 002820, released August 19, 1981) (Hearing Designation Order).

potential adverse effects on opportunities for new entrants.[35] To avert spectrum inefficiency and exclusion of innovative and efficient service providers, the Act gives the Commission broad discretion to establish flexible payment methods. Specifically, the Act requires the Commission to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the [economic opportunity] objectives..." There are several ways the Commission can use this discretion to respond to requests for policies to promote superior service efforts to the public and "economic opportunity".

While the details of the various proposals differ, a common theme among them is the demand for appropriate recognition of innovative proposals for equitable distribution of service to the public, and spectrum-efficient infrastructure sharing arrangements that encourage new entry. For example, American Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. advocate a "host license" arrangement for firms offering specialized PCS services. APC states that by adopting a program that would establish and guarantee "technology affiliations" with a PCS licensee to secure a portion of the licensee's overall licensed areas, small business could share a portion of the licensee's facilities, particularly in switching and access management functions, and other services, such as billing, marketing, maintenance, technical matters, and accounting. CalCell Wireless advocates an "infrastructure preference" for PCS applicants that commit to serve and operate in designated enterprise zones and promote participation by racial minorities. MCI advocates a consortium approach with opportunities for small, minority and female entrepreneurs. NABOB contends that major companies deriving substantial benefits from FCC licenses should be required to joint venture or otherwise participate with minority companies. SBPA recommends a Small Business Developer's License for experimental licensees who have put forth significant effort and investment in developing the service being licensed. Tampa Electric Company calls for partnering incentives between 2 GHz incumbents and PCS licensees based on the wholesale licensee concept.

Discussion. These proposals indicate that the Commission could protect the public interest in the use of spectrum by authorizing alternative methods of bidding, bid calculation, and bid

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35 Letter of Hon. Larry Irving, Assistant Secretary for Communications and Information, to David Honig, trustee, Minority Media Ownership Fund, June 17, 1993.

payments for bidders with superior service proposals. In particular, alternative bidding calculations would allow technical and non-technical innovators to discount a percentage of the bid the applicant would otherwise pay based on a qualitative assessment of the applicant's business development proposal. To qualify for the credit, bidder would have to qualify as (a) a member of a designated group, or (b) as a consortia owned and controlled by firms owned by members of the designated groups. The business development proposal could establish eligibility for credits based on multiples of expenditures for research and development on spectrum efficiency incurred by the applicant; the projected value of the bidder's commercial activities to the community of license; or the value of public services the bidder proposes to offer. Public service could include, for example, provision of on-the-job training or work-study relationships with local educational institutions. We believe a ten percent credit for individual small business entities is an adequate incentive for this purpose. For business development proposals involving consortia, the consortia should be allowed to elect a combination of credits and installment payments reflecting the quantifiable value of the proposal involved, not to exceed twenty five percent of the total bid.

Installment Payments and Royalties

Where small entities bid, but make no superior service proposal, the Commission can foster economic opportunities by allowing unconditional installment payments with or without royalties. Consistent with the purpose of the Budget Reconciliation Act, this approach would permit winning small bidders to elect to make payments over time, and thereby reduce the up-front capital requirements the prospective licensee must have to bid. However, we are somewhat uncertain about the net value of royalty payments to small businesses. MCI points out that the recovery of $4 billion in the form of auction bids from PCS licenses over the next five years would equate to an effective charge of $12 per PCS customer per month. This is roughly 25 percent of expected revenues, assuming 1.6 million PCS customers in 1994, and 9 million in 1998. The burden of this surcharge for spectrum access, it is asserted, would "eliminate the ability of new PCS entrants to compete against the entrenched [cellular incumbents]."[36] For these reasons, we do not view royalties as the optimal solution to the entry cost problems of small business bidders.

Distress Sales

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36 Steve Zecola, MCI, supra, note 26.

The broadcast distress sale policy has some promise as a model for an economic opportunity safeguard. In the broadcast context, licensees designated for hearing have the option to assign the license to a minority firm for 75% of market value or less. Distress sales serve the dual public interests in diversity of ownership and administrative efficiency by obviating the need for costly and time-consuming hearings to resolve alleged violations of Commission rules, while remedying informational and financial barriers to market entry for historically underrepresented groups. In the PCS context, a distress sale policy could achieve analogous administrative equities and efficiencies.

In order to assure prompt delivery of PCS services to the American public, the Narrowband PCS Order provides that failure by any licensee to meet construction requirements will result in forfeiture of the license and the licensee will be ineligible to regain it. At the present time, however, no provisions for the disposition of the narrowband or broadband PCS licenses exist. The distress sale concept could answer this problem by granting forbearance on royalties or installment payments if the defaulting licensee assigns the license to a new qualified small business entrant. Unlike the broadcast distress payment, however, the assignee of a PCS distress sale license would assume all or part of the licensee's obligation.

Another variation of the distress sale concept might apply where tentative winners are ineligible, unqualified, or unable to pay, such as in the context of multiple license bids. We believe the Commission should impose penalties on parties that knowingly abuse the bidding process. This policy could also include a distress sale option to create incentives for defaulting bidding to assign construction permits to small entities.

Communications Capital Fund

Spectrum auctions would benefits designated groups to a greater extent if a portion of the revenues from spectrum auctions were reinvested in small businesses seeking to enter the communications field.[37] Accordingly, we recommend that the Commission seek legislation from Congress to establish an investment fund small businesses. Alternatively, the Commission could explore with the NTIA and the SBA whether an executive order can and should be adopted to

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37 Prof. Andrea Johnson, Statement before the SBAC, May 27, 1993, p 6.

accomplish this end.

Tax Certificates

Background

The SBAC has reviewed numerous expressions of interest in routine issuance of §1071 tax certificates for various PCS transactions. The SBA Office of Advocacy, through a spokesman who participated in our May hearings, informally endorsed consideration of the use of tax certificates for investments in SBA licensed investment companies. Several parties also advocated various proposals for issuance of tax certificates to entrepreneurs in PCS industries.[38] Numerous parties in the Emerging Technologies proceeding submitted comments in support of the Commission's subsequent determination that Docket 90-314 is eligible for §1071 treatment, and that issuance of tax certificates is necessary to facilitate relocation of microwave licensees in the 2 GHz frequency band.

Discussion

At the outset, we are compelled to acknowledge certain criticisms involving allegations of misrepresentation and rapid transfer of facilities acquired with tax certificates. For example, the 1958 amendments to the tax certificate statute resulted from some cases in which broadcast properties were intentionally acquired in excess of the applicable multiple ownership rules, and then improperly sold in an attempt to obtain certificates that would not otherwise be available. While we are not aware of any recent deliberate abuses along these lines, we believe IRS authority to rescind tax certificate benefits upon a finding by the Commission that a sale or exchange under the policy involved fraud or misrepresentation operates as a strong structural deterrent to abuse.[39] We are also aware that the one year holding period requirement applicable to minority owned facilities acquired under §1071 has been criticized. The one year rule, however, was adopted in a Commission action repealing anti-trafficking rules and was not originally a part of the tax certificate policy.[40] The solution to this problem, therefore, would appear to be the reinstatement of a lengthier holding period for all broadcast licensees.

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38 The parties include representatives from a coalition of civil rights groups, the Coalition to Improve the Tax Certificate Policies, and American Personal Communications, Inc.

39 Cloutier v. United States, 709 F.2d 480 (7th Cir. 1983).

40 Prior to that time, minority owners, like other licensees, were routinely required to hold the license for a minimum period of three years Amendment of Section 73.3597 of the Commission's Rules, 99 F.C.C. 2d 971,973, 974 (1985).

While we are concerned by these criticisms, we believe the benefits of the policy far outweigh the disadvantages. First of all, §1071 authorizes capital gains deferrals, rather than capital gains exemptions, tax credits, or across-the-board tax rate reductions. In this regard, the benefit of the tax certificate is more comparable to an interest-free government loan equal to the taxable portion of the gain. Moreover, as with involuntary conversions of property covered by §1033 of the Internal Revenue Code, the policy also leverages private investment by requiring entrepreneurs to use the entire gain from the sale to reinvest or reduce basis in retained property. This means that for every dollar in taxes the taxpayer avoids, the tax certificate leverages about three dollars of private reinvestment capital, for public interest investment, that were not subject to taxation in the first instance. We note that the government also captures tax revenues from the jobs associated with the buyer's grandfathered property, from jobs associated with the seller's replacement property, and from the sale of the depreciated or replacement property if the sale produces a taxable gain.

Conclusion and Summary of Recommendations

Due to the important capital leveraging benefits, and apparent fiscal neutrality of the policy, we support extending tax certificate treatment to microwave licensees and SBA chartered investment companies that promote small business participation in PCS deployment. We also urge the Commission to revise the existing minority tax certificate program. At the same time, it has come to our attention that the U.S. House Subcommittee on Select Revenue Measures will hold hearings on proposals to deter abuse of the tax certificate policies. We support these efforts to deter abuse of the public trust and intend to work closely with the Commission and the Congress to ensure, to the extent possible, that no abuses result if the proposals we endorse below are adopted.

Microwave Tax Certificates. The basic justification for issuing tax certificates to microwave licensees is that deployment of broadband PCS technology cannot commence until the 2 GHz frequency band allocated for PCS is vacated. The rules give most incumbents three years to relocate voluntarily with the assistance of tax certificates, however, some incumbents are exempt from these rules. We believe these rules should have two economic opportunity components. First, we propose that the Commission consult with the IRS on ways to encourage incumbents seeking tax certificate treatment for relocation to satisfy replacement property requirements by investing in small business

concerns. Second, we propose that the Commission issue tax certificates to exempt microwave licensees that establish PCS consortia or joint ventures, and extend equity ownership opportunities to small business concerns, upon divestiture of their interest in the consortia or venture. Giving exempt incumbents the option to participate in the development and implementation of PCS facilities, by forming small business consortia, could accelerate speed of deployment while meeting financial and technical assistance needs of small business concerns.

SSBIC Tax Certificates. We also agree with the SBA Office of Advocacy that the Commission should consider extending tax certificates to encourage investment by, and in, SBA chartered SSBICs that provide debt and equity financing, and technical assistance, to licensees and applicants owned by members of minority groups and women. Integration of the Commission's tax certificate program with the SBA's SSBIC program is appropriate for several reasons. Tax certificates would make SSBICs specializing in telecommunications more competitive with venture capital firms in other fields as a result of tax advantaged capital gains deferrals. This would also enhance their ability to syndicate debt and equity securities for small business participation in PCS development and implementation. As we pointed out before, passive investors, including SSBICs, have long been subject to the FCC's regulatory jurisdiction by virtue of assistance provided to FCC licensees.[41] Finally, cooperation between the FCC, SBA and IRS would also help contain the potential for abuse.

Minority Tax Certificates. Finally, the use of tax certificates to promote minority ownership of non-broadcast facilities has been advocated for over a decade.[42] At the recommendation of the 1982 FCC Advisory Committee on Alternative Financing Strategies for Minority Telecommunications Ventures, members of Congress introduced proposals for extension of §1071 to non-broadcast transactions in 1983. In 1990, the League of United Latin American Citizens, the National Association

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41 While the resources available to SSBICs are modest compared to chartered banks and savings and loan institutions, the Commission has stated for purposes of cellular financial commitments that "we do not wish to exclude smaller entities with the financial ability and genuine desire to finance cellular systems." Rules for Rural Cellular Service, 4 FCC Rcd 2542 (1988) See also, Washington's Christian Television Outreach, Inc., BC 002820, released August 19, 1981) (Hearing Designation Order).

42 For a discussion on the use of minority tax certificates in the broadcast area, see Krasnow, Kennard, and Temkin, Maximizing the Benefits of Tax Certificates in Broadcast and Cable Ventures, Hastings Communications and Entertainment Law Journal, Volume 13, Number 4 (Summer 1991).

for the Advancement of Colored People, the National Black Media Coalition, and the National Hispanic Media Coalition, petitioned for issuance of tax certificates for satellite transponder enterprises. In 1992, the Coalition to Improve the Tax Certificate Policies petitioned the Commission to expand the tax certificate policy to promote investment by joint ventures and specialized minority venture capital funds in common carrier and non-mass media technologies. The recent passage of the Budget Reconciliation Act eclipses the various legal ambiguities and technicalities that have encumbered consideration of these proposals. For reasons we have already substantially explained throughout this report, we believe the time has come to take action. Therefore, we urge the Commission to respond favorably by announcing that in the future it will follow the expansive definition of "broadcasting" applied in Telocator Network of America, 58 RR 2d 1443 (1985), recon dismissed, 1 FCC Rcd. 509 (1986) in reviewing requests for PCS tax certificates pursuant to the Statement of Policy Regarding Minority Ownership In Broadcasting, 52 R.R. 2d 1301 (1982).

CLASSIFICATION STANDARDS

Background

The SBA administers a variable standard for determining whether an entity is small for purposes of obtaining financial assistance from an SBIC. The standard permits an applicant to qualify based on a net worth not in excess of $6.0 million with average net income after Federal income taxes for the two preceding years not in excess of $2.0 million. Alternatively, the applicant can qualify by showing that together with affiliates, and excluding affiliates, it meets the size standard for the industry in which it is primarily engaged as set forth in §121.601. See, 13 CFR 121.802(a)(2). Regarding the latter test, PCS fits the definition of a radiotelephone service which the Census Bureau includes in standard industrial classification code 4812. SBA standards define "small" in that SIC code as firms that employ 1,500 employees or less. 13 CFR 121.610. In addition, SBA guidelines contain provisions for waiver whereby applicable thresholds are increased by 25% whenever an applicant agrees to use the SBA's assistance within a "labor surplus area" or "redevelopment area." §121.802(d).

Discussion

The basic problem with the existing standards is that these standards were not tailored to implement the economic opportunity provisions of the Budget Reconciliation Act. The existing net

worth/income size standard is probably too low for an industry that will be as capital intensive as the PCS industry. The service area and bandwidth recommendations would not be effective if the classification excludes independently owned and non-dominant firms with the wherewithal to construct PCS facilities that may cost from $50 - 100 million. On the other hand, size standards based on a threshold of 1,500 employees is too high. This threshold runs the risk that the vast majority of the entities covered by SIC Code 4812 would be eligible for bidding preferences and tax certificate assistance even though these entities face no special history of exclusion or economic disadvantage.

If the Commission concurs that a new standard should be established, it will also have to determine whether the Small Business Act governs its discretion to prescribe numerical size standards for determining whether an entity is small. Prior to the Small Business Credit and Business Opportunity Enhancement Act of 1992, federal agencies could establish size standards for activities not covered by the Small Business Act by merely consulting with the SBA Administrator. The 1992 amendments limit agency discretion by requiring agencies to promulgate size standards based on gross receipts indices that are be approved by the SBA Administrator and to comply with SBA policies regarding the formulation of the standards.[43] The Act, however, does not "impair the ability of an agency to implement small business size standards without obtaining SBA's concurrence in response to a specific statutory direction or a general legislative authorization to prescribe small business size standards." Thus, if the Commission determines that the Budget Reconciliation Act constitutes a specific statutory direction, consultation with the SBA Administrator should suffice for procedural purposes.

Conclusion

Consistent with our focus on capital formation and utilization of SBICs, we believe size standards should be consistent with the SBA's approach to eligibility for financial assistance from SBICs; however, we also believe different thresholds need to be established. We believe the

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43 Under the SBA's proposed regulations to implement the Act, an agency may prescribe a size standard different from that determined by the SBA under three conditions. First, the standard is being proposed after an opportunity for notice and comment. Second, the standards provide for size determinations of concerns providing services based on average gross receipts over a period not less than three years. Third, the size standard must be approved by the SBA Administrator.

appropriate method of resolving this issue is to request comment on this point in future proceedings in this Docket. As a starting point for discussion, the Commission should seek comment on whether to set the threshold at $20 million, with waivers of up to 25% for entities that use federal assistance in labor surplus areas. The Commission should solicit the SBA's assistance and cooperation so that to ensure that a proper standard is set regardless of which procedure prevails. Regarding control criteria, we believe minority and female controlled entities should be subject to anti-trafficking requirements, should maintain 51% equity and voting control from the initial grant through construction and operation of the PCS license.

SUMMARY AND CONCLUSION

We believe the proposals we endorse in this report are responsible efforts to promote economic opportunity and fair to all concerned. Both the public, especially small businesses and residential consumers, will benefit from the enhanced spectrum efficiencies and innovations that will likely result from spectrum set-asides for small businesses, and incentives for strategic spectrum sharing alliances with small businesses. In addition, we have tailored our recommendations on bidding preferences, tax certificates, and certification of financial qualifications, to address serious capital formation difficulties which have the potential to distort PCS development and implementation. If adopted, we believe these proposals would, in a moderate way, mitigate the persistent barriers that African Americans, Hispanic Americans, Native Americans, and Asian Americans, have encountered in their long quest for parity of ownership in telecommunications, while also empowering women to extend the tremendous strides they have made in other fields of the economy to the field of telecommunications. We also believe that the measures we propose will benefit small rural telephone companies by guaranteeing these entities the opportunity to compete for licenses in their local areas, and by supplementing financial and technical assistance available the financial assistance of the Rural Electrification Administration.

Appendix D: A Procedure for Calculating PCS Signal Levels at Microwave Receivers

The new Rules adopted in Part 99 stipulate that estimates of interference to fixed microwave operations from a PCS operation will be based on the sum of signals received at a microwave receiver from the PCS operation. This appendix describes a procedure for computing this PCS level.

In general, the procedure involves four steps:

1. Determine the geographical coordinates of all microwave receivers operating on co-channel and adjacent frequencies within the coordination distance of each base station and the characteristics of each receiver, i.e., adjacent channel susceptibility, antenna gain, pattern and height, and line and other losses.

2. Determine an equivalent isotropically radiated power (e.i.r.p.) for each base station and equivalent e.i.r.p. values for the mobiles and portables associated with each base station. Determine the values of pertinent correction and weighting factors based on building heights and density and distribution of portables. Close-in situations, prominent hills, and extra tall buildings require special treatment.

3. Based on PCS e.i.r.p. values, correction and weighting factors, and microwave receiving system characteristics determined above, calculate the total interference power at the input of each microwave receiver, using the Longley-Rice propagation model.

4. Based on the interference power level computed in step 3, determine interference to each microwave receiver using criteria described in Part 99 and EIA/TIA Bulletin 10E.

The interference from each base station and the mobiles and portables associated with it is calculated as follows:

$$P_{rbi} = 10\text{Log}(p_{tbi}) - L_{bi} - UC_i + G_{mwi} - AC_i$$

$$P_{rmi} = 10\text{Log}(n_{mi} \times p_{tmi}) - L_{mi} - UC_i + G_{mwi} - AC_i$$

$$P_{rpsi} = 10\text{Log}(n_{psi} \times p_{tpsi}) - L_{psi} - UC_i + G_{mwi} - AC_i$$

$$P_{rpbi} = 10\text{Log}(n_{pbi} \times p_{tpbi}) - L_{pbi} - UC_i - (BP_i - BH_i) + G_{mwi} - AC_i$$

$$P_{rpri} = 10\text{Log}(n_{pri} \times p_{tpri}) - L_{pri} - (UC_i - BH_i) + G_{mwi} - AC_i$$

where:
P refers to Power in dBm
p refers to power in milliwatts

P_{rbi} = Power at MW receiver from ith base station in dBm
p_{tbi} = e.i.r.p. transmitted from ith base station in milliwatts, which equals power per channel x number of channels x antenna gain with respect to an isotropic antenna - line loss
L_{bi} = Path loss between MW and base station site in dB
UC_i = Urban correction factor in dB
G_{mwi} = Gain of MW antenna in pertinent direction (dBi)
AC_i = Adjacent channel discrimination of MW system in dB
P_{rmi} = Power at MW receiver from mobiles associated with ith base station
p_{tmi} = e.i.r.p. transmitted from mobiles associated with ith base station
n_{mi} = Number of mobiles associated with ith base station
L_{mi} = Path loss between MW and mobile transmitters in dB
P_{rpsi} = Power at MW receiver from outdoor portables (s for sidewalk)
p_{tpsi} = e.i.r.p. transmitted from outdoor portables associated with ith base station
n_{psi} = Number of outdoor portables associated with ith base station
L_{psi} = Path loss between MW and outdoor portables in dB
P_{rpbi} = Power at MW receiver from indoor portables (b for building)
p_{tpbi} = e.i.r.p. transmitted from indoor portables associated with ith base station
n_{pbi} = number of indoor portables associated with ith base station
L_{pbi} = Path loss in dB between MW and base station site (using average building height divided by 2 as effective antenna height)
P_{rpri} = Power at MW receiver from rooftop portables (r for rooftop)
p_{tpri} = e.i.r.p. transmitted from rooftop portables associated with ith base station
n_{pri} = Number of rooftop portables associated with ith base station
L_{pri} = Path loss in dB between MW and base station site (using average building height as effective antenna height)
BP_i = Building penetration loss at street level in dB
BH_i = Height gain for portables in buildings dB = 2.5 x (nf-1), where nf is number of floors

Finally, the total PCS interference power at a given microwave receiver from all the base stations in a given frequency band is found by summing the contributions from the individual stations. Likewise, the total interference power at a given microwave receiver from all mobiles and portables operating in a given frequency band is found by summing the contributions from the mobiles and portables associated with each cell.

$$p_{rb} = \sum_i p_{rbi} \quad \text{milliwatts}$$

$$p_{rm} = \sum_i (p_{rmi} + p_{rpsi} + p_{rpbi} + p_{rpri}) \quad \text{milliwatts}$$

$$P = 10 \text{ Log}(p) \quad \text{dBm}$$

Base Stations. Interference from each base station to each microwave should normally be considered independently. A group of base stations having more or less (within ± 50 percent) the same height above average terrain, the same e.i.r.p., basically the same path to a microwave receiving site, and subtending an angle to that receiving site of less than 5 degrees, may be treated as a group, using the total power of the group and the average antenna height of the group to calculate path loss, L.

The urban correction factor, UC, should not be applied to base station antenna heights that are greater than 50 percent of the average building height for a cell.

Mobile Stations. The e.i.r.p. from mobile transmitters is weighted according to the number of base station channels expected to be devoted to mobile operation at any given time. The antenna height of mobiles used in calculating path loss,L, is assumed to be 5 feet.

Portable Stations. The e.i.r.p. from the portable units associated with each base station is weighted according to the estimated portion of portables associated with that cell expected to be operated inside buildings at any given time and the portion which could be expected to be operating from elevated locations, such as balconies or building rooftops. For example, in the case of service intended for business use in an urban area, one might expect that perhaps 85 percent of the portables in use at any given time would be operating from within buildings and perhaps 5 percent might be operating from rooftops or balconies. The remaining 10 percent would be outside at street level.

Calculation of an equivalent e.i.r.p. for cells in suburban areas will involve different weighting criteria. Contributions to the e.i.r.p. from that portion of portables within a cell operating from inside single-family homes shall be reduced by 10 dB.

Urban Correction Factor. The urban correction factor (UC) depends on the height and density of buildings surrounding a base station. For the core area of large cities, it is assumed to be 35 dB. For medium size cities and fringe areas of large cities (4- to 6-story buildings with scattered taller buildings and lower buildings and open spaces) it is assumed to be 25 dB; for small cities and towns, 15 dB, and for suburban residential areas (one- and two-story, single family houses with scattered

multiple-story apartment buildings, shopping centers and open areas), 10 dB.

Building Height and Building Penetration Factors. The building height correction, BH, is a function of the average building height within the nominal coverage area of the base station. It is used in conjunction with the building penetration loss, BP, to adjust the expected interference contribution from that portion of the portables transmitting from within buildings. The adjustment is given by:

BP = 20 dB in urban areas
BP = 10 dB in suburban areas

BH = 2.5 x (nf-1) dB

where nf is the average height (number of floors) of the buildings in the area.

(Note that this formula implies a net gain when the average building height is greater than 8 floors). All buildings more than twice the average height should be considered individually. The contribution to BH from that portion of portables in the building above the average building height should be increased by a factor of 20Log(h) dB, where h is the height of the portables above the average building height in meters.

Adjacent Channel Correction Factor. A factor based on the selectivity of the microwave receiver.

Propagation Model. The PCS to microwave path loss, L, is calculated using the Longley-Rice propagation model, Version 1.2.2., in the point-to-point mode. The Longley-Rice [1] model was derived from NBS Technical Note 101 [3], and updated in 1982 by Hufford [3]. Version 1.2.2 incorporated modifications described in a letter by Hufford [4] in 1985. Terrain elevations used as input to the model should be from the U.S. Geological Survey 3-second digitized terrain database.

Special Situations. If a cell size is large compared to the distance between the cell and a microwave receiving site so that it subtends an angle greater than 5 degrees, the cell should be subdivided and calculations should be based on the expected distribution of mobiles and portables within each subdivision.

If terrain elevations within a cell differ by more than a factor of two-to-one, the cell should be subdivided and microwave interference calculations should be based on the average terrain elevation for each subdivision.

If a co-channel PCS base station lies within the main beam of a microwave antenna (± 5 degrees), there is no intervening terrain,

and the power at the microwave receiver from that base station, assuming free space propagation, would be 3 dB or less below the interference threshold, interference will be assumed to exist unless the PCS licensee can demonstrate otherwise by specific path loss calculations based on terrain and building losses.

If any part of a cell or cell subdivision lies within the main beam of a co-channel microwave antenna, there is no intervening terrain, and the accumulative power of 5 percent or less of the mobiles, assuming free space propagation would be 3 dB or less below the interference threshold, interference will be assumed to exist unless the PCS licensee can demonstrate otherwise by specific path loss calculations based on terrain and building losses.

If a building within a cell or cell subdivision lies within the main beam of a co-channel microwave antenna, there is no intervening terrain, and the cumulative power of 5 percent or fewer of the portables, assuming free space propagation, would be 3 dB or less below the interference threshold, interference will be assumed to exist unless the PCS licensee can demonstrate otherwise by specific path loss calculations based on terrain and building losses.

References:

1. Longley, A.G. and Rice, P.L., "Prediction of Tropospheric Radio Transmission Loss Over Irregular Terrain, A Computer Method-1968", ESSA Technical Report ERL 79-ITS 67, Institute for Telecommunications Sciences, July 1968.

2. Hufford, G.A., Longley, A.G. and Kissick, W.A., "A Guide to the use of the ITS Irregular Terrain Model in the Area Prediction Mode", NTIA Report 82-100, U.S. Department of Commerce, April 1982. Also, Circular letter, dated January 30, 1985, from G.A. Hufford, identifying modifications to the computer program.

3. Rice, P.L., Longley, A.G., Norton, K.A., Barsis, A.P., "Transmission Loss Predictions for Tropospheric Communications Circuits," NBS Technical Note 101 (Revised), Volumes I and II, U.S. Department of Commerce, 1967.

4. Hufford, G.A., Memorandum to Users of the ITS Irregular Terrain Model, Institute for Telecommunications Sciences, U.S. Department of Commerce, January 30, 1985.

Appendix E: Compliance with ANSI/IEEE RF Guidelines

A. Calculation of Maximum Permissible Exposure (MPE)

The IEEE C95.1-1991 guidelines for "uncontrolled" environments specify that power densities (as averaged over any 30 minute period) in the frequency range from 300-3000 MHz should not exceed values defined by the equation:

$$S = \frac{f}{1500}$$

Where:

S = Power density in milliwatts per square centimeter (mW/cm^2)
f = Frequency in MHz

For example, at a frequency of 1850 MHz the allowed power density would be 1850/1500 = 1.23 mW/cm^2.

Exposure of the user of a hand-held PCS transmitter must be evaluated in terms of the specific absorption rate (see part B below).

In all other cases, to determine the appropriate separation distance from a PCS transmitter to meet the MPE "uncontrolled" limits the following equation can be used.

$$S = \frac{P \times G}{4 \times \pi \times D^2}$$

Where:

S = Allowed power density
P = Power supplied to the antenna
G = Antenna gain (numeric) relative to an isotropic antenna
D = Minimum separation distance for continuous exposure

Solving for D:

$$D = \sqrt{\frac{P \times G}{4 \times \pi \times S}}$$

B. Exposure Evaluation for Hand-held PCS Transmitters

Section 4.2 of the ANSI/IEEE guidelines specifies criteria for evaluation of the exposure to users of hand-held, low-powered devices. The guidelines are given in terms of either power radiated from a device or specific absorption rate (SAR) caused by the device. Radiated power exclusions apply for operating frequencies between 100 kHz and 1500 MHz but do not apply when the device is maintained within 2.5 cm of the body of the user.

Until such time as it is decided that radiated power exclusions can be applied at frequencies above 1500 MHz (see footnote 139 in the text), compliance for a hand-held device operating at PCS frequencies between 1850 and 2200 MHz will require evaluation of the SAR produced by the device (see footnote 140).

The ANSI/IEEE guidelines specify that in "uncontrolled" environments, and for operating frequencies between 100 kHz and 6 GHz, compliance requires that spatial peak SAR not exceed 1.6 watts/kilogram (W/kg) as averaged over any 1 gram of tissue and as averaged over the appropriate time period defined in the standard. In the hands, wrists, feet and ankles spatial peak SAR shall not exceed 4 W/kg as averaged over any 10 grams of tissue.

September 23, 1993

Dissenting Statement

of

Commissioner Andrew C. Barrett

In re: Amendment of the Commission's Rules to Establish New Personal Communications Services [Second Report and Order]

This proceeding commenced in 1989 with the filing of several petitions for rulemaking. During the past four years, the Commission developed an extensive record on the appropriate role for future Personal Communications Services [PCS] in this country. In response to our Notice of Proposed Rulemaking and Tentative Decision in this proceeding [Notice][1], more than 150 parties have participated on the record. Over 100 companies have been granted licenses to conduct approximately 200 experiments. This summer, Congress passed and the President signed the Omnibus Budget Reconciliation Act of 1993, Public Law 103-66. That law includes provisions which require us to complete this PCS docket within 180 days of enactment, issue licenses utilizing competitive bidding procedures, and establish regulatory parity for commercial mobile service providers. After four years and with an extensive record, the time has come for the Commission to decide how PCS will impact the future of our telecommunications infrastructure into the 21st century. Today we make that decision. Unfortunately, as a matter of public policy, technical analysis, and rational market economics, I cannot support this decision. For me, today's decision raises more questions than it answers. In an attempt to make everyone happy, the majority has created a consensus decision that involves a complicated labyrinth of a few large allocations and numerous small market allocations, in varying size spectrum blocks. I believe the extensive record in this proceeding supports a better solution than the majority arrives at today. Given the value of spectrum, and the potential explosion of services possible from our new allocations for PCS services, the only aspects of this decision that I can support are: 1. The allocation of 120 MHz for licensed PCS services; and 2. the allocation of 40 MHz for unlicensed PCS services. Beyond that basic framework, I believe the decision has serious flaws, some of which the market may not be able to understand or sufficiently correct. There is some hope that the competitive bidding process could correct these flaws in today's decision. However, even in that context, I believe this

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[1] See 7 FCC Rcd 5676 [1992]; Erratum, 7 FCC Rcd 5779 (1992); and Tentative Decision and Memorandum Opinion and Order, GEN Docket No. 90-314, 7 FCC Rcd 7794 (1992).

decision imposes impractical transaction costs in order to accomplish complicated spectrum and market aggregation schemes across over 2,000 small licenses throughout the country. For reasons explained below, I must dissent.

Public Policy

As a matter of public policy, the Commission has established four values for the structure of PCS services: 1. Competition in delivery of services; 2. speed of deployment; 3. universality of services; and 4. diversity of services. We have emphasized the need to furnish PCS providers with the ability to reach and serve existing and new markets in an economic and responsive manner. We also have expressed our desire to ensure that all mobile services are provided with the highest quality at low-cost. Reasonable rates must be available to the greatest number of consumers.

After synthesizing these policy goals and analyzing the voluminous record, I established my own policy framework for assessing this PCS decision. My primary concerns are: 1. Spur significant competition to cellular by creating major opportunities for new players; 2. Increase competition in the local exchange areas; 3. Provide significant viable opportunities for wide-area PCS services; 4. Remain neutral on eligibility, and allow all companies to participate aggressively in PCS; 5. Provide significant opportunities for unlicensed data services; and 6. Provide viable, long-term opportunities for small businesses, minorities, women, and rural telephone companies to compete in the PCS market. After comparing these policy objectives with the record and numerous PCS lobbying efforts, I have concluded the following: 1. At least 3 significant viable opportunities for wide-area PCS allocations are needed to spur compatible, interoperable services on a regional basis or throughout the country[2]; 2. At

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[2] "Above three competitors, the overall wireless market appears to become saturated. The addition of new competitors above this level does not increase the total penetration by more than a few tenths of a percentage point . . . [w]ith three PCS providers, consumers would have a minimum of six wireless service providers including the two cellular providers and NexTel/Fleet Call as an ESMR provider. Letter from *Anne V. Phillips, American Personal Communications to Byron F. Marchant, Esq., Office of Commissioner Barrett* 1 (September 15, 1993) *see* "Summary of Findings, DSS Research on General Docket 90-314" attached.

In addition to PCS licenses authorized today, the market also will include PCS data services licensed at 900 MHz, Enhanced Mobile Service Providers (ESMR), LECs, cellular and future mobile satellite service providers for voice and data services. Within this market context, dividing PCS spectrum into little slivers and 7 additional licenses per market, appears ridiculous.

least 3 significant viable new opportunities for wide-area PCS services are required in order to allow new players such as utility companies, cable companies, computer companies, newspaper companies, private service providers and others to compete without being hindered by cellular and local exchange companies 3. At least 3 viable, significant opportunities are required in order to justify a neutral eligibility decision, and allow cellular companies and local exchange companies to compete for one of the major PCS licenses without significantly hindering other new competitors, in or out of their exchange markets; 4. A variety of viable mechanisms are required to enhance the participation of small businesses, minorities, rural telephone companies and women in our new PCS licensed services; 5. A licensing scheme that is relatively simple, clearly economic and easy for the market to understand is the best alternative, both in terms of capital formation and competitive opportunities; and 6. At least 3 major licensing opportunities are needed to allow for the award of a significant pioneer preference in major markets without severely hindering other competitors who seek to compete for similar licenses in those markets.

Given these policy objectives, I was willing to support proposals that provided at least 3 major PCS licensing opportunities in a Major Trading Area (MTA), and with remaining spectrum, allocate clearly viable and economic smaller opportunities in the Basic Trading Area (BTA). All of these areas could be aggregated across markets to allow wider area interoperable services. After reviewing the record, and being lobbied on these issues over the past months, I have concluded that the mix of market sizes between MTAs and BTAs is not likely to give a significant, viable competitive opportunity to those holding BTA licenses, unless those entities are either existing cellular companies or local exchange companies, or providing very narrowly niched services. Thus, in order to accommodate my various policy objectives for viable PCS services, I became willing to seriously consider PCS licensing options which included more MTA areas rather than less MTA areas. I believe MTA consortium could established technical standard and interoperability requirements over wide areas more easily. This could include at least 3 MTAs with a mix of 20, 25, 30 or 40 MHz allocations.[3] In exchange for licensing

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[3] These combinations could include 4/20 MHz MTA, 3.25 MHz MTA, 3/30 MHz MTA, 1/40 MHz and 2/20 MHz MTA, 2/30 and 1/20 MHz MTA or 3/40 MHz MTA. All of these proposals include the possibility of at least 3 significant MTA license opportunities that can be aggregated across geographic areas. The less spectrum that remained for smaller BTA allocations under any of these proposals, the more I would require that MTA licenses include rural telcos, small businesses, minorities and women in their ownership and operational structure. I would at least provide MTA licensees with incentives [i.e. tax certificates, bidding flexibility] to include

more rather than less MTA areas, I would support requirements or enhancement credits for including small businesses, rural telcos, minorities and women as part of the ownership and operational structure of any MTA consortia. Further, for cellular interests who are considered to be in-market I would have supported requirements for them to include small businesses, rural telcos, minorities and women in order to operate an MTA license. Under this scenario, I believe small businesses would have a better chance of surviving in an MTA consortia, than if they are licensed to compete only as a single, standalone BTA inside an MTA. Any remaining spectrum could be licensed to small business or niche services.

As a matter of policy, I have become aware within the past week that set-asides for small businesses may or may not be contemplated by Public Law 103-66, and will require further, significant debate on the record at the FCC before they can be established.[4] I do not expect that this debate will occur without controversy. Thus, by granting more rather than less MTA licenses in today's decision, I believe that our licensing scheme could have provided greater opportunities for significant new competitive PCS licensees, while seriously accommodating small business and rural telephone interests in those allocations.[5] Further, since all

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small businesses, minorities, women, and rural telcos in their ownership and operational control. To the extent we establish the legal predicate for small business or rural telco set-asides, I also support licensing a viable BTA spectrum block for that purpose.

[4] "Last month, on the House Floor, Congressman Hastert accurately voiced our jointly-held belief: 'This language will ensure that the FCC promotes competition during this new procedure, thereby giving all potential bidders the opportunity to procure spectrum at auction.' Any qualified entity should be free to bid for licenses subjected to competitive bidding." Letter from the Honorable J. Dennis Hastert, James Slattery, Paul E. Gillmor, Joe Barton, Michael D. Crapo, and Bill Paxon, Members of Congress to the Honorable Andrew C. Barrett, Commissioner, Federal Communications Commission 1 (September 21, 1993)(on file with the Office of Commissioner Andrew C. Barrett). *See also* Letter from the Honorable John D. Dingell, Chairman, U.S. House of Representatives, Committee on Energy and Commerce, to the Honorable James H. Quello, Chairman, Federal Communications Commission 2 (September 21, 1993).

[5] A recent letter from NTIA indicated that the Commission should allocate a total of 100-200 MHz for licensed PCS, and divide that overall allocation into three licenses of 30 MHz each, with additional licenses of 10-15 MHz each. Letter from Larry Irving, Assistant Secretary for Communications and Information, United

major market sizes are the same, the chance for at least 3 significant new competitors could spur a quicker development of interoperable, lower-cost PCS services and compatible technical standards. Both potential investors and the capital markets could understand the future competitive possibilities of this structure, in the context of the overall market for mobile services.

Without three major allocation opportunities, I believe the issue of cellular or LEC entry into MTA licenses could have a significant preclusive effect on other competitors in those markets. Allowing these entities to own one of only 2 MTA licenses, whether in or out of market, could significantly hinder the number of new competitors [i.e. not telephone or cellular companies] who can compete and offer alternative low-cost, interoperable PCS services. However, excluding cellular and local exchange companies altogether also is not a good solution either, since they can contribute significantly to the rapid development of future PCS services. Thus, on balance, I believe their participation in MTA licenses is more properly balanced where we provide for at least 3 viable major market license alternatives.[6]

The pioneer preference decision also is severely complicated by the scheme adopted today. Granting a pioneer preference to one of 2 MTA licensing opportunities has a significant preclusive effect that puts the policy at greater legal risk. On the other hand, only granting 1/10 MHz or 1/20 MHz BTA license to a pioneer preference selectee also appears ridiculous in terms of economic opportunity, and does not comport with the lobbying efforts of the tentative pioneer preference designees.[7] Thus, under any scenario, we will find ourselves in a bind on this future decision as a result of the licensing structure adopted today. I believe that the policy could be sustained more easily by providing at least 3 major market opportunities, with a pioneer preference selectee awarded one of those 3 licenses.

I strongly believe that the 4/10 MHz BTA allocations provided today are uneconomic as a matter of public policy, even if they allegedly provide feasible technical alternatives for ancillary

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States Department of Commerce to the Honorable James H. Quello, Acting Chairman, Federal Communications Commission 2 (September 14, 1993).

[6] *Id.* at 7, 2.

[7] Among the members of PCS *ACTION, INC.* the tentative pioneer preference selectees have advocated spectrum size at 40 MHz in large spectrum blocks: American Personal Communications/The Washington Post Company; Cox Enterprises, Inc., and Omnipoint Corporation. *See* also attached addendum to dissent, "List of Record Participants by Size of Spectrum."

services by LECs and cellular companies.[8] I also believe that the 1/20 MHz BTA block contemplated for small business in the 1850-1990 MHz band will ultimately be uneconomic as a matter of market size relative to 2 larger MTAs. As a technical matter, this block will also suffer additional burdens due to the possible requirement to move microwave links before that license could commence service throughout its BTA. Wasting spectrum in this manner confuses the market, puts additional financial burdens on small business, and requires complicated aggregation schemes to make these allocations usable beyond niche services. Burdening small business with a symbolic allocation is not my goal. While being included in the lower band is important for equipment interoperability, I am concerned that the larger vision of market competition has been lost. In the allocation adopted today, small businesses will find themselves at significant market disadvantages in their efforts to compete against larger MTA licenses or consortia. Without deep pockets behind small business interests, I am concerned that they are doomed to failure from the start in a capital intensive business.[9]

As a matter of public policy, I do not believe the action today constitutes a visionary allocation decision. For me, it raises more questions than it answers. In an effort to compromise to all angles of a voluminous four-year record, I believe this decision limits the future possibilities for PCS. Other than 2 major MTA players, which could include among them the existing LECs, cellular companies, and interexchange carriers, I do not see additional economically viable PCS opportunities in today's decision. This is not sound public or economic policy for a significant infrastructure decision such as PCS. At a minimum, I

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[8] If we were going to provide "piecemeal" PCS allocations, I would have at least concurred in part to an option that provided all 20 MHz allocations in a mix of MTAs and BTAs, with the ability to aggregate as necessary in the group bids. Further, instead of chopping blocks into these little pieces, I would have preferred to hold them in a spectrum reserve until further developments in PCS equipment were known. At least in these contexts, I am more confident from the start that "viable" economic allocations have been made to individual PCS licensees. Otherwise, at this point, I am guessing as to how economic, low-cost PCS service will be provided by more than two major PCS competitors. The rest is a "tossup" based on unpredictable allocation and aggregation schemes in tiny market areas and minuscule spectrum slivers.

[9] In addition to concerns about set-asides raised in Chairman Dingell's letter, I also am concerned that we are "funneling" small businesses into an allocation where they may become sham operations for larger entities behind the scenes. If it is not clear they can compete on their own in this capital intensive business, I do not want to fool the public in this regard.

would have requested that this decision be tested further in a notice, before finalizing it in an Order. However, given the importance of moving forward on this matter, regardless of significant disagreement, I have decided to vote today. The nation deserves the opportunity to have PCS services launched in some form.

Technical Analysis

I also cannot support this allocation for technical reasons. I do not believe the record sufficiently addresses the technical utility of minuscule 10 MHz BTA allocations above 2 GHz, in a myriad of tiny markets around the country. Not only has this decision sacrificed a larger public policy vision of PCS, with at least several viable new competitors, it also has provided allocations in 10 MHz blocks without significant record commentary.[10] I do not understand what 1,938 new 10 MHz BTA allocations will permit with respect to low-cost PCS. Other than existing cellular and LEC companies utilizing 10 Mhz to offer ancillary services, I do not understand how this allocation moves the PCS vision forward. Neither the record or internal discussions have made me feel comfortable in this regard. Further, I believe the 20 MHz BTA allocation contemplated for small businesses in the lower band will "saddle" these entities with additional technical and economic hurdles that their PCS MTA competitors can avoid, and which cellular companies using 10 Mhz for ancillary services also can avoid. Thus, they immediately are put at a technical and operational disadvantage relative to other PCS competitors.

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[10] Of the studies mentioned in today's decision that reference the 10 MHz bandwidth, only two raise the issue sufficiently. Neither study analyzes 10 MHz channel block allocations above 2 GHz [i.e. 2130-2200]. Of the two studies by Motorola, Inc. and PowerSpectrum, Inc. - only Motorola presents a detailed bandwidth plan [i.e. 2/40, 2/10, 1/20]. PowerSpectrum, Inc. asserts in a conclusory fashion that a width of 10-20 MHz would preserve spectrum efficiency. There is no analysis to affirm that assertion. *See* In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Comments of PowerSpectrum, Inc. at 4, November 9, 1992 (F.C.C. 1992) (No. 90-314). The availability of the upper bandwidth was acknowledged to have altered the difficulties presented by microwave interference in many of the ex parte contacts over the last three weeks. At a minimum, a thorough feasibility and technical study of the 10 MHz option was called for after the opening of the second bandwidth. I have not seen such a thorough study to support the decision today. See In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Comments of Motorola, Inc. at 7.

There are several technical issues which I question in this item; questions I believe the market and potential PCS investors should ask themselves, as well. First, the allocation today contemplates that 30 MHz MTA licenses in the band below 2 GHz could aggregate a 10 MHz BTA in the band above 2 GHz in order to get 40 Mhz. However, given comments on equipment development in bands below and above 2 GHz, it appears that dual band equipment will be more expensive and bulky, and is not readily available at this time.[11] Thus, it appears that today's decision complicates the equipment picture for any 40 MHz visions, both in terms of unequal market sizes [ie. MTA/BTA] and in terms of differing technical characteristics in the allocations. Further, it is not apparent to me how little 10 MHz BTA slivers will spur equipment development for the upper band. Given the myriad of outcomes with 1,938 10 Mhz spectrum slivers, interoperability and volume equipment purchases is likely to be a significant problem.[12]

Second, I am not comfortable with the analysis of technical feasibility for 10 MHz slivers above 2 GHz. It appears that only one party has indicated how much geographic coverage 10 mhz provides in bands above 2 GHz, in 11 cities of the country. That coverage chart indicates that 10 MHz will only allow geographic coverage in 15-30% of an entire urban area in attractive markets such as Los Angeles, Chicago, San Francisco, Miami and Dallas.[13] Clearly, this coverage is well below the 70-80% coverage required to compete effectively in these urban markets. Unless 10 MHz is

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[11] The equipment design required to operate at the upper limits of the 2.2 GHz bandwidth is just entering the development stage. As the current state of gallium-arsenide IC and ASIC technology is still in R&D, its costs will remain high. As Northern Telecom has correctly noted, " . . . it will be expensive (dual RF stages) and bulky to provide one hand set capable of covering the entire 1.8-2.2 GHz band." Letter from J. Ron Cross, Director, Regulatory Policy Analysis to Mr. Wayne Schelle, American Personal Communications 1 (September 14, 1993) (on file with Office of Commissioner Andrew C. Barrett). *See also* DENNIS M. RUCKER, UNITED STATES CELLULAR CORPORATION, DISCUSSION ON CHANNELIZATION & FREQUENCY AGILITY 1 (1993).

[12] I note that there were only 1468 cellular license opportunities in MSAs and RSAs around the country, and cellular companies are still struggling with solutions to compatible technical standards and interoperability problems over 10 years later. I would expect this problem will quadruple under the decision made today.

[13] See Memorandum from L. Petch to T. Stanley, Additional Spectrum Availability Info, Summary of APC Data for 4 x 10 Plan at 230 MHz 3 (September 17, 1993)(on file with the Office of Commissioner Andrew C. Barrett).

just designated as a throwaway for cellular or LEC companies who may be able to develop ancillary services in even narrower bands than 10 MHz, I do not understand how 10 MHz allocations will move the PCS vision forward.[14] No further technical analysis has been provided to reduce my discomfort on this matter.[15] Further, given this geographic coverage problem, contemplating an additional 10 MHz sliver for small business may be a cruel hoax without solid technical foundation. Until a more thorough band study is provided on 10 MHz allocations above 2 GHz, I question their feasibility in terms of geographic coverage and economic service. Thus, in addition to public policy and market issues, I cannot support this decision as a technical matter. The record on the feasibility of 10 MHz appears slim, and mostly anecdotal. Aside from the data submittal by American Personal Communications (APC) on the top 11 cited for 10 MHz allocations above 2 GHz, I have seen no further feasibility analysis on the record.

In addition, if 10 MHz BTA slivers are adequate, I question why 20 MHz is not sufficient in the lower band MTAs, since PCS proponents could always aggregate more spectrum to satisfy their geographic coverage problems. Thus, I wonder whether a 10 MHz allocation undermines the technical rationale for 30 MHz allocations in the lower band. It would appear that as a technical matter, three 20 MHz blocks would be sufficient.[16] If

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[14] *See* In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Comments of Motorola, Inc. at 7-12 November 9, 1993 (F.C.C. 1992) (No. 90-314).

[15] The 10 MHz bandwidth is disconcerting for many reasons, not the least of which is the absence of support within the ex parte record. Of the multitude of industry and government representatives that have made the record over the past four years, only two (2) cite 10 MHz as a viable option and three more cite to it as collateral to other concerns - like unlicensed PCS (Bell Atlantic), as a variable in the 5 x 20 MHz proposal (APC), or as a temporary haven for refugee microwave companies (Apple, Inc.). The overwhelming industry consensus formed around 20, 30 or 40 MHz schemes. *See* attached addendum.

[16] See our own analysis of the Campbell program as reviewed in Memorandum from L. Petch to T. Stanley, Campbell Program Analysis Conclusions for 4 x 20 Plan at 1850 MHz 1 (September 17, 1993) (on file with the Office of Commissioner Andrew C. Barrett). Other ex parte submissions supporting this observation include McCaw, A Plan For Optimizing 2 GHz PCS Goals (1993) and J. Barclay Jones, American Personal Communications, Engineering Statement In Re Personal Communications Services General Docket 90-314 (1993). Further, our own staff work indicates that 5 Mhz of clear spectrum per PCS provider could provide capacity comparable to current cellular analog

more spectrum is needed, these blocks could at least joint venture with small business in the BTA area within that lower band. Under the spectrum "gerrymander" issued today, small business can be completely bypassed by larger MTA entities; with a likelihood that they cannot survive on their own merit within the allocation.

Third, the 20 MHz BTA block in the lower band [ie. 1850-1990 MHz] contemplated for small business could become an "albatross" allocation. First, our own information indicates that these 20 MHz BTA allocations are likely to encounter fixed microwave clearing problems in order to achieve full coverage in major cities. It is ironic that today's decision only contemplates imposing this burden on small businesses and rural telephone companies.[17] No other MTA license in the same markets appear to have this fixed microwave sharing/coverage area problem. A 20 MHz allocation in the upper band does not appear to have the same problem, due to different technical links among fixed microwave users. According to an APC survey of 20 MHz allocations in the band above 2 GHz, a clear 10 MHz is available in top cities such as Los Angeles, New York, Washington D.C., Detroit and San Francisco throughout 80-90% of these areas. Thus, it is more likely that a 20 MHz BTA for small business in the upper band will provide for broader geographic coverage on a sharing basis than the lower band allocation. While I note that the Small Business Advisory Committee (SBAC) has advocated an allocation in the lower band due to equipment compatibility concerns, I question the technical basis for this request.[18] I have seen no model from the SBAC which shows the

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operations with 25 Mhz clear spectrum. If OET's study indicates that 20 Mhz of spectrum will achieve 10 Mhz of clear spectrum on average in urban areas, then query why larger spectrum blocks are needed for MTAs, putting small business at a competitive disadvantage within the same areas. FEDERAL COMMUNICATIONS COMMISSION, OFFICE OF ENGINEERING & TECHNOLOGY, PCS 2 GHZ SPECTRUM ASSIGNMENT ALLOCATIONS (SEPTEMBER 3, 1993).

[17] "Even relocating cooperative microwave licensees will require about two years per microwave path. Borderline cooperative licenses that do not wish to move but would consider doing so will require some three to five years. The "hard cases" -- licensees that wish to exercise their right to remain in the 2 GHz band -- will require eight to twelve years of negotiation, reengineering, and FCC action to move to other frequency bands. AMERICAN PERSONAL COMMUNICATIONS, 20 MHZ ALLOCATIONS ARE AN INSUFFICIENT FOUNDATION FOR A VIBRANT AND COMPETITIVE PCS INDUSTRY (SEPTEMBER 7, 1993) (For urban analysis *see* Federal Communications Commission, Office of Engineering & Technology, Summary of APC Study (September 9, 1993).

[18] Though citing the lower band in their September 15, 1993 study, the Small Business Advisory Committee's conclusion that "20 MHz-25MHz is a reasonable allocation of spectrum for PCS. To

expense of moving microwave users for small businesses. Nor have I seen a model or technical study which shows how small businesses will be able to compete in geographic areas where they cannot provide full service coverage from the start. I also question what kind of capital formation problem is created for small businesses who cannot provide full area coverage throughout their service areas. Thus, as a technical and economic matter, I am not sure that the upper band does not provide better geographic coverage possibilities for small businesses from the start. If the upper band was not allocated in the " piecemeal" manner adopted today, I question how manufacturers would respond to larger allocations with respect to equipment development. Further, if cellular or rural telephone companies are given incentives to develop equipment in this band through an open 20 MHz allocation, I question whether small business would even be at a disadvantage in this regard. To the extent this has not been debated and analyzed in the record sufficiently, I cannot support a decision which could burden small business with a 20 MHz BTA block[19] that may not provide full geographic coverage from the start. As I explain further below, I believe this relegates the small business PCS allocation to a weak market position, relative to larger MTA licensees who will cover the same markets without spectrum gaps.

Thus, as a technical matter, the questions raised by this item require me to dissent on this matter, as well. While I support an

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ensure that small businesses are not excluded from licensing opportunities due to the use of competitive bidding, we also support at least one 20-25 MHz allocation for small business PCS applicants in the lower band. In any event, the amount of spectrum for the small business allocation should be consistent with the predominant spectrum block allocations." FEDERAL COMMUNICATIONS COMMISSION, OFFICE OF SMALL BUSINESS ADVISORY, REPORT OF THE FCC SMALL BUSINESS ADVISORY COMMITTEE TO THE FEDERAL COMMUNICATIONS COMMISSION REGARDING GEN DOCKET 90-314 (SEPTEMBER 15, 1993) 10. If we take the OSBA recommendations at face value, consistent spectrum block allocation and market sizes, the antithesis of the structure now approved, is the means to small business participation in the PCS market. Competing against an MTA license with more spectrum is not part of the OSBA recommendation. As we have taken a diametrically opposite approach to market structure, small business will only suffer from the fallout of the Commission's actions.

[19] It is ironic that if the Commission finds itself unable to establish a set-aside under the competitive bidding scheme, this allocation may be subject to open entry. Other than rural telephone companies, I question how small businesses will be able to compete for anything but a 10 MHz sliver in the upper band if that occurs. Thus, limiting the vision of PCS in our decision today could become even more harmful in the future if small businesses can't even obtain this spectrum in the bidding process.

effort to give small businesses and rural telephone companies viable local service opportunities, I am not certain the record is conclusive on where that allocation is best situated to provide full geographic coverage. Equipment issues can be resolved later in the marketplace and may become minor issues compared to the expense of relocating microwave users from the start. Given the burden placed on small businesses in today's decision, I am not sure they will really be able to get out of the starting blocks and find a sufficient market niche against their MTA PCS competitors; particularly since cellular and LEC entities also will compete in the same markets. Further, I am not comfortable with the lack of record analysis of 10 MHz allocations above 2 GHz.

Market Economics

Under today's decision, I believe the MTA licenses will be strong from the start and get stronger over time. Other than cellular companies who can use a 10 MHz sliver in a BTA, I believe the remaining 1938 10 MHz BTA and 487 20 MHz BTA allocations will whither in the ensuing chaos. Unless a "deep pocket" regional or national investor can quickly rescue the small business license, I believe it is clearly doomed from the start. Complicated competitive bidding aggregation schemes across spectrum blocks and many small markets also could create significant, unnecessary transaction costs and a myriad of interoperability problems. Left to stand alone as a market allocation, I believe the small business BTA will be demolished by the MTA licensee, particularly where the BTA in the lower band cannot provide full area coverage from the start. I would have more confidence that this BTA allocation could survive if it was subject to open entry by any entity. At least in that context, deeper pockets could aggregate larger areas to compete with the MTA. In the decision adopted today, I believe small business will scramble from day one to : 1. Raise capital; 2. Bid for spectrum; 3. Pay to move fixed microwave licensees where necessary; 4. Build out their areas; and 5. Find a niche against 2 large MTAs, cellular with PCS spectrum, LECs with MTA or BTA spectrum, ESMR operators and 900 MHz PCS data providers.[20] Under the competitive scenario, better opportunities for small business may exist under the umbrella of various MTA licenses, given the significant capital investment requirements.[21] Rural telcos could

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[20] In addition, we are considering licenses for mobile satellite service data and voice providers in the near future.

[21] The ex parte contacts of the rural telcos revealed a willingness to support 40 MHz as part of consortia in an MTA. See also Letter from Edolphus "Ed" Towns, Member of Congress, to Andrew C. Barrett, Commissioner, Federal Communications Commission 1 (September 13, 1993) (on file with the Office of Commissioner Andrew C. Barrett).

benefit under either an MTA or BTA scenario. Thus more MTAs rather than fewer MTAs could spur this participation. A bunch of 10 MHz sliver BTAs are uneconomic in the long-term, and may be uneconomic to small business from "day one." I have seen studies on the record that the market could be saturated beyond 3 new PCS competitors, assuming LEC and cellular interests constitute existing competitors.[22] When one looks at a map of 47 MTAs and 487 BTAs, it is hard to envision 7 new viable PCS licenses within each market. Other than large interexchange players, LECs, cellular, and maybe some ESMRs, who can really survive in that environment. I believe the record supports issuing licenses for no more than 3-5 viable new players. Beyond 3 viable PCS licenses, I believe the other 2 licenses are relegated to niche or ancillary services. Today's decision represents a "piecemeal" BTA approach that is likely to cause more confusion with respect to future PCS market services.

Other Issues

Unlicensed Devices

It is not clear to me why all data services should not be allocated spectrum in the lightly loaded band, from 1910-1930, particularly if wireless mobile data is included in that mix, and requires band clearing to operate.[23] I question whether voice services could be coordinated in a more heavily loaded band. This issue has been highlighted for me at the last minute by Apple's emergency petition. I am not sure how it should be resolved. Thus, I am not comfortable that the decision today will result in fewer problems for mobile data services. I have reservations about this aspect of the item, and would prefer additional information on its impact.

Cellular Eligibility: Attribution and Ownership Standard

A 20% attribution standard for cellular, regardless of whether it is active or passive is another problem in the item today. I

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[22] *Id.* at 2.

[23] Letter from Edward J. Markey, Chairman, U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Telecommunications and Finance, to James H. Quello, Chairman, Federal Communications Commission, p. 2 (September 20, 1993) (on file with the Office of Commissioner Andrew C. Barrett. *See also* In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Emergency Petition i.c.o. Apple Computer, Inc. (No. 90-314)

believe cellular, and LECs with cellular interests, should be given a fair shot to participate in PCS MTA areas. This item precludes that option with respect to passive investments [i.e.limited partnership] or noncontrolling investments greater than 20% equity. As a result, the attribution standard in conjunction with the 10% overlap standard, could relegate many cellular and LEC interests to bit players in PCS through the 10 MHz BTA license. Further, rural telephone companies may find themselves unnecessarily restricted from PCS due to this limitation.[24]

With respect to the market entry question in an MTA for cellular, I would be more flexible and allow cellular entry in the MTA where cellular owns no more than 25-30% of pops in that area. It is ridiculous to look at MTA allocations in Los Angeles and San Francisco and believe that an MSA allocation in San Diego will be able to control prices in the market from the Mexican Border to Bakersfield California, and east to Las Vegas Nevada and parts of Arizona. Yet, a 10% pops restriction does just that. Common market sense is lacking in this decision. Further, it is not clear to me how you can control the Dallas MTA by owning a license in the Dallas MSA and operating in an area from El Paso Texas on the West border to approximately Monroe Louisiana on the East border, and from the Texas/Oklahoma border on the North to the Mexican border and Austin, Texas in the south. This is also true if one looks at the MTAs covering New Mexico, Northern California, North/South Carolina, and the four-state MTA of Colorado, Wyoming, Nebraska and South Dakota. The record support for 10% is questionable.[25] Even APC advocates 20-25% of pops.[26] I must dissent to these portions of the decision, as well. They do not make much market sense.

Construction and Buildout Requirements

I would support more restrictive construction and buildout

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[24] Letter from Jim Bunning, Member of Congress, to the Honorable James H. Quello, Chairman, Federal Communications Commission (September 16, 1993) (on file with the Office of Commissioner Andrew C. Barrett.)

[25] Id. at 10, 11. See also draft Order, Amendment of the Commission's Rules to Establish New Personal Communications Services at 19-22, 27, 36, and 39 (Gen. Docket No. 90-314).

[26] APC comments cite a 25% overlap of pops with cellular companies operating in the same MTA. See also Telephone and Data Systems, Inc., 2 GHz PCS discussion on Channelization & Frequency Agility 13 (1993).

requirements than the item adopts today. In order to promote service to populations in the large MTA areas licensed today, I would support a stricter service requirement for MTAs; 50% of the population in the licensed area within 5 years, and 75% of the population within 7 years. More flexible buildout requirements for BTA's are conceivable, given the smaller areas involved. Further, I would provide incentives at the competitive bidding process, through bidding enhancements, to allow rural telcos to participate in MTA consortia in order to buildout rural areas within MTA areas more quickly, regardless of population.[27] I believe those entities bidding for MTA's should be on notice as to stronger coverage requirements at the time of their bid. I also would contemplate bidding enhancement credits to those entities who propose and certify more aggressive coverage plans as a result of consortia efforts.

Under today's decision, I am uncertain how much service will be delivered throughout various MTAs. This could give LEC or cellular companies who get involved in one of the two MTA licenses further incentive to slowly introduce services that compete with their own interests.

My Decision

Today's decision raises more questions than it answers from a policy perspective, technical perspective, and market economics perspective. I believe it is unnecessarily complicated because it attempts to bend in every direction at once, without any focus. I believe it severely limits the future vision of PCS. Greater market power will be concentrated in two MTA licenses, potentially enhancing the power of LEC, cellular, and interexchange carriers who are likely to bid for these licenses. In some cases, the market may not correct for these mistakes. Under the scenario today, it may have been better to license all 20 MHz BTAs and let aggregation solve market size and spectrum problems. At least everyone would have a more equal chance from the start. The decision today also puts our pioneer preference policy in greater jeopardy. Which license to give a pioneer preference selectee will be a major problem.

Beyond the 2 MTA licenses, if the market gets confused as to the future potential of PCS, I am not surprised. The item must rely on the competitive bidding process to "straighten out" this mess. However, given the myriad of possibilities among 1,938 10

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[27] Letter from the Honorable John D. Dingell, Chairman, U.S. House of Representatives, Committee on Energy and Commerce, to the Honorable James H. Quello, Chairman, Federal Communications Commission (September 21, 1993) (on file with the Office of Commissioner Andrew C. Barrett).

MHz BTA licenses, and 487 20 MHz BTA licenses, who knows what "patch quilt" will be assembled. The transaction costs for aggregation across spectrum and markets will be significant.

Further, despite my strong support for small business and rural telephone participation in future PCS services, I have reservations today regarding the viability of the allocation contemplated today. There are various ways to ensure small businesses, minorities, women and rural telephone companies can participate. One way, however, is not to "doom" them from the start with a spectrum allocation that creates more potential operational and market burdens than any other allocations. Given an uneven size of market and more spectrum for MTA licenses, I believe the small business BTA is put at a significant competitive disadvantage. Add to that, potential geographic coverage problems within the 20 MHz location, and I believe these entities are even further behind from the start. To infer that they will also aggregate a 10 MHz BTA sliver, subjects them to dual band equipment development and costs that have not been sufficiently analyzed in the record. If they are going to be designated for a certain spectrum block in the BTA, I would prefer an allocation that gives small business and rural telcos a greater chance at full area coverage from day one. Any other problems can be handled by the market. Thus, despite great intentions for small business and rural telcos PCS participation, which I support, I am not confident that today's decision gives them a viable starting point. Time will tell.

APPENDIX ONE

List, Advocates of 10MHz/Mini-Spectrum Licenses

Corporations

Bell Atlantic - for unlicensed PCS only
Motorola - 2 x 40 MHz with additional 2 x 10 MHz for smaller economy of scale
PowerSpectrum, Inc. (CPSI)
Apple Computer, Inc. - for use by vacating microwave users

APPENDIX TWO

List, Advocates of 20MHz/Small Spectrum Licenses

Corporations
- Advanced Cordless Technologies
- Alltel Companies
- American Mobile Communications
- American Petroleum Institute (API)
- Apple Computer
- AT&T/McCaw
- Comcast PCS Communications, Inc.
- GTE Corporation
- Southern New England Telecommunications Corporation
- Telephone Data Systems, TDS
- Taxpayers Assets Project
- Vanguard Cellular Systems, Inc.

Government
- U.S. Department of Justice
- Small Business Administration
- F.C.C., Office of Plans and Policy

Independent Studies
- the David Reed study

Small Business
- Chesnee Telco
- Coalition for Wireless Competition
- Concord Telco
- F.C.C., Office of Small Business Administration
- Fleet Call (NexTel)
- Power Spectrum
- Rural Cellular Corp.

Trade Groups
- CTIA
- National Telephone Cooperative Association
- South Carolina Telephone Association
- United States Telephone AssociationUtilities
- Bell South
- Cincinnati Bell Telephone Company
- Farmer's Telephone Cooperative
- Lancaster Telephone Company
- Roseville Telephone Company
- Lincoln Telephone and Telegraph Company
- NYNEX Corporation
- Pennsylvania Public Utilities Commission
- Piedmont Rural Telephone Cooperative, Inc.
- Rochester, West Carolina Rural Telephone Cooperative, Inc.
- Southwestern Bell

Utilities Telecommunications Council
Associated Public Safety Communications Officers, Inc.

Qualified Supporters

MCI - only in so far as their 40 MHz scheme is augmented by two local PCN with 20 MHz of spectrum.
APC - only in so far as their 40 MHz scheme confines 20 MHz slices to the BTAs.

APPENDIX THREE

List, Advocates of 30MHz/Medium Spectrum Licenses

Corporations

- Adelphia Communications Corporation
- Advanced Mobilecomm Technologies, Inc.
- AMSC Subsidiary Corporation
- Calcell Wireless, Incorporated
- Celsat
- City Utilities of Springfield Missouri
- Communications Satellite Corporation
- dbx Corporation
- Harris Corporation
- Hughes Network Systems, Inc.
- NewChannels Corporation
- Northern Telecom
- Personal Communications Network Services of New York, Inc.
- ROLM
- Sprint
- Teco Energy Company

Government

- California Public Utilities Commission (CPUC)
- National Telecommunicatons and Information Agency

Trade Associations

- American Petroleum Institute (API)

APPENDIX FOUR

List, Advocates of 40MHz/Large Spectrum Licenses

Corporations

- American Personal Communications (APC)
- Associated PCN Company (Associated PCN)
- Comsearch
- Cox Enterprises (Cox)
- Omnipoint
- Time-Warner Telecommunications
- Interdigital Communications Corp.
- MCI Telecommunications Corp.
- PacTel
- PCN America, Inc.
- PCN Communications
- QualComm

October 22, 1993

Statement
of
Commissioner Ervin S. Duggan

In Re: Personal Communications Services

Today, the Commission completes one of its most complex and important proceedings--- involving, as large matters always do, the balancing of competing goals and a clamor of competing interests. Notwithstanding those difficulties, I believe we can be proud of the process by which we have reached today's decision, and pleased with the outcome.

When we first embarked on the effort to create a regulatory structure for new personal communications services, we set forth four fundamental goals: First, broad availability of services; second, speedy deployment; third, a broad diversity of services, and finally, robust competition between licensees. Our decision today, in my judgment, moves us toward these goals, and as an ancillary benefit may help add to the Federal treasury, create new jobs and improve our competitive industrial posture abroad.

The spectrum allocation plan defined in this order balances our goal of creating a competitive market for wireless voice and data services with a certain degree of participation for existing telecommunications providers, including existing wireless providers. We will also allow cellular carriers to participate fully in PCS outside of their service areas, and on a limited basis, within those areas. We have also proposed to create special opportunities for participation in PCS services by rural telephone companies and small, minority and female-owned businesses.

Along with our proposals for competitive spectrum bidding, today's plan also seeks to minimize the transaction costs necessary to create efficient PCS operations. Our intention is that the marketplace determine the optimal size of spectrum blocks and service areas for the many different visions of PCS we hope to see. Our allocation plan, for example, will permit proponents of wide area, broadband PCS to bid for larger spectrum blocks. But it will also allow the more specialized services that can be accommodated in smaller blocks of spectrum. The precise mechanisms to accomplish all this remain to be determined, and will be developed through the companion competitive bidding proceeding we launch

today. But our allocation plan, and the related regulatory and technical rules adopted in the Second Report and Order, envision a flexible regulatory structure for PCS which will give both large and small companies opportunities to enter and succeed in a promising new sector of telecommunications.

While I am generally pleased with our actions today, I have concerns on two issues. First, concerning unlicensed PCS, I am concerned about the impact of our action on nomadic devices, which will have a particular need for clear, unencumbered spectrum. I have publicly stated my conviction that these devices promise enormous gains in productivity and convenience. But they cannot reach their full potential until an appropriate block of frequencies has been entirely cleared of potential interference. I would like to see the Commission extend itself to "pure" nomadic PCS.

My second concern is with the way we define cellular licensees as eligible--- or ineligible--- to bid on certain PCS licenses. Our proposed attribution rule would deem any party ineligible who holds an ownership interest greater than 20% in a cellular system, even where this interest is non-controlling or passive in nature. I would like to find a way to accommodate parties holding such interests if they are non-controlling or passive interests, since it seems to me unduly harsh to bar parties who are incapable of engaging in anti-competitive conduct. On the other hand, I am concerned that entities that today possess a 20 percent or greater ownership interest might restructure to bring their interests down below the 20 percent threshold, even while retaining the same level of control as before. Under our current rules, such an entity would not be considered a cellular licensee for purposes of applying for PCS licenses. The record does not reveal whether this should be a substantial concern. But if the record on reconsideration suggests that this could be a problem, I am prepared to reconsider the ownership rules to take such concerns into account.

Despite these relatively minor qualms, I am happy with today's result. I believe that history--- to the extent that history pays attention at all to what we do--- will deem today's action by the FCC a significant and far-reaching act.

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*U.S. Government Printing Office: 1993 — 300-842/00004